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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1968

MAY 19 THROUGH JUNE 23, 1969
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

EARL WARREN, CHIEF JUSTICE.
HUGO L. BLACK, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
JOHN M. HARLAN, ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
POTTER STEWART, ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.

RETIRED.

STANLEY REED, ASSOCIATE JUSTICE.
TOM C. CLARK, ASSOCIATE JUSTICE.

JOHN N. MITCHELL, ATTORNEY GENERAL.
ERWIN N. GRISWOLD, SOLICITOR GENERAL.
JOHN F. DAVIS, CLERK.
HENRY PUTZEL, jr., REPORTER OF DECISIONS.
T. PERRY LIPPITT, MARSHAL.
HENRY CHARLES HALLAM, JR., LIBRARIAN.

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*Mr. Justice Fortas resigned effective May 14, 1969.

393401

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.*

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, THURGOOD MARSHALL, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 9, 1967.

(For next previous allotment, see 382 U. S., p. v.)

*By order of May 26, 1969, the Court temporarily assigned MR. JUSTICE BRENNAN to the First Circuit. See *post*, p. 931.

PRESENTATION OF "THE OCCASIONAL PAPERS OF MR. JUSTICE BURTON."

SUPREME COURT OF THE UNITED STATES.

MONDAY, MAY 19, 1969.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL.

Mr. William S. Burton, a member of the Bar of this Court, stated:

MR. CHIEF JUSTICE, may it please the Court:

On behalf of the Burton family—and particularly on behalf of Mrs. Harold H. Burton—leave is respectfully requested to present to the library of the Supreme Court of the United States, and to each member of the Court, the first copies of a publication entitled "The Occasional Papers of Mr. Justice Burton."

Generous participation by the Bowdoin Press of Bowdoin College, Brunswick, Maine, has helped make this publication possible.

The publication is presented as one man's footnote to four simple and explicit words—EQUAL JUSTICE UNDER LAW.

THE CHIEF JUSTICE said:

It is generous of your dear mother, the Burton family, and President Coles of Bowdoin College to present to the Court this collection of vignettes of history of the Supreme Court.

This Court has never had an official historian, but your father, Mr. Justice Burton, was the historian in fact

during the thirteen years he served with us. He could recall every member who had ever sat on the Court and could recall with whom that member was sitting at any given date. In order to give emphasis to the fact that this is a continuing body and that there has been only one Court, he pointed out graphically that if anyone came to the Court in the 180 years of its existence he would have seen one of seven men sitting there—Cushing, Marshall, Wayne, Field, White, McReynolds or Hugo Black.

Each year he wrote for his Circuit Judicial Conference on some historic event in the life of the Court. Some of these writings are recaptured in this little volume entitled "The Occasional Papers of Mr. Justice Burton." We are very happy to have them for ready reference, and I am sure the book will find a cherished place in the library of each of us.

Although it is eleven years since he retired, the majority of the Court now sitting served with him—JUSTICE BLACK and JUSTICE DOUGLAS throughout his tenure; JUSTICE HARLAN for approximately four years; JUSTICE BRENNAN for three years, and myself for five years.

We always valued the words of Mr. Justice Burton, whether they were recorded in his opinions in the United States Reports, in his speeches, or in words spoken in our Conferences. We knew that they were always forthright, sincere, and directed to some purposeful end. I am sure I can say without any danger of contradiction that no man in the long history of the Court was held in higher esteem by his colleagues than was Justice Harold H. Burton, and this book will be another means for us to perpetuate his nostalgic memory.

We are happy that his widow, Selma, for whom we have the same affection we had for him, is here today to witness this little ceremony, and we express our thanks to her and all of the Burton family for presenting this reminder of the affection that her husband had for this Court which he served so nobly.

RETIREMENT OF MR. CHIEF JUSTICE WARREN.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 23, 1969.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL.

THE CHIEF JUSTICE said:

We are honored today by the presence of the President of the United States as a member of this Bar.

Mr. President, may I recognize you at this time.

President Nixon said:

Mr. Chief Justice, may it please the Court:

I am honored to appear today, not as President of the United States but as a member of the Bar admitted to practice before this Court.

At this historic moment I am reminded of the fact that while this is the last matter that will be heard by the Chief Justice of the United States, the first matter to be heard by this Court when he became Chief Justice was the occasion when, as Vice President of the United States, on October 5, 1953, I moved the admission of Warren Olney III and Judge Stanley Barnes to be members of [the Bar of] this Court.

I have also had another experience at this Court. In 1966, as a member of the Bar, I appeared on two occasions before the Supreme Court of the United States. Looking back on those two occasions, I can say, Mr. Chief Justice, that there is only one ordeal which is more

challenging than a Presidential press conference and that is to appear before the Supreme Court of the United States.

On this occasion, it is my privilege to represent the Bar in speaking of the work of the Chief Justice and in extending the best wishes of the Bar and the Nation to him for the time ahead.

In speaking of that work, I naturally think somewhat in personal terms of the fact that not only is the Chief Justice concluding almost 16 years in his present position, but that today he concludes 52 years of public service to local, State, and National Governments:

As District Attorney in Alameda County, as Attorney General of the State of California, as Governor of the State of California, the only three-term Governor in the history of that State.

The Nation is grateful for that service.

I am also reminded of the fact that the Chief Justice has established a record here in this Court which will be characterized in many ways. In view of the historical allusion that was made in the opinions just read, may I be permitted an historical allusion?

Will Rogers, in commenting upon one of the predecessors of the Chief Justice, Chief Justice William Howard Taft, said that "It is great to be great. It is greater to be human."

I think that comment could well apply to the Chief Justice as we look at his 52 years of service. One who has held high office in this Nation, but one who, in holding that office, always had the humanity which was all-encompassing, the dedication to his family, his personal family, to the great American family, to the family of man.

The Nation is grateful for that example of humanity which the Chief Justice has given to us and to the world.

But as we consider this moment, we also think of the transition which will shortly take place. We think of what it means to America, what it means to our institutions.

Sixteen years have passed since the Chief Justice assumed his present position. These 16 years, without doubt, will be described by historians as years of greater change in America than any other in our history.

And that brings us to think of the mystery of Government in this country, and for that matter in the world, the secret of how Government can survive for free men. And we think of the terms "change" and "continuity." Change without continuity can be anarchy. Change with continuity can mean progress. And continuity without change can mean no progress.

As we look over the history of this Nation, we find that what has brought us where we are has been continuity with change. No institution of the three great institutions of our Government has been more responsible for that continuity with change than the Supreme Court of the United States.

Over the last 16 years there have been great debates in this country. There have been some disagreements even within this Court. But standing above those debates has been the symbol of the Court as represented by the Chief Justice of the United States: fairness, integrity, dignity. These great and simple attributes are, without question, more important than all the controversy and the necessary debate that goes on when there is change, change within the continuity which is so important for the progress which we have just described.

To the Chief Justice of the United States, all of us are grateful today that his example, the example of dignity, the example of integrity, the example of fairness, as the chief law official of this country, has helped to keep America on the path of continuity and change, which is so essential for our progress.

When the historians write of this period and the period that follows, some with a superficial view will describe the last 16 years as the "Warren Court" and will describe the Court that follows it as the "Burger Court."

I believe, however, that every member of this Court would agree with me when I say that because of the example of the Chief Justice, a selfless example, a non-selfish example, this period will be described, not only his but that of his successor, not as the Warren Court, not as the Burger Court, not in personal terms, but in this hallowed moment in this great chamber, the Supreme Court. It was always that way; may it always be that way. And to the extent that it is, this Nation owes a debt of gratitude to the Chief Justice of the United States for his example.

THE CHIEF JUSTICE said:

Mr. President, your words are most generous and are greatly appreciated, I assure you. I accept your personal, kind words, but in doing so I must confess that I sense in your presence here and in the words you have spoken your great appreciation of the value of this Court in the life of our Nation and the fact that it is one of the three coordinate Branches of the Government and that it is a continuing body.

I might point out to you, because you might not have looked into the matter, that it is a continuing body as evidenced by the fact that if any American at any time in the history of the Court—180 years—had come to this Court he would have found one of seven men on the Court, the last of whom, of course, is our senior Justice, Mr. Justice Black. Because at any time an American might come here he would find one of seven men on the Bench in itself shows how continuing this body is and how it is that the Court develops consistently the eternal principles of our Constitution in solving the problems of the day.

We, of course, venerate the past, but our focus is on the problems of the day and of the future as far as we can foresee it.

I cannot escape the feeling that in one sense, at least, this Court is similar to your own great office and that is that so many times it speaks the last word in great governmental affairs. The responsibility of speaking the last word for not only 200 million people, but also for those who follow us is a very awesome responsibility.

It is a responsibility that is made more difficult in this Court because we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences. And conscience sometimes is a very severe taskmaster.

But the Court through all the years has pursued a more or less steady course, and in my opinion has progressed and has applied the principles set forth in the 5,000 general words of the Constitution in a manner that is consistent with the public interest and consistent with our future so far as it can be discerned.

We do not always agree. I hope the Court will never agree on all things. If it ever agrees on all things, I am sure that its virility will have been sapped because it is composed of nine independent men who have no one to be responsible to except their own consciences.

It is not likely ever, with human nature as it is, for nine men to agree always on the most important and controversial things of life. If it ever comes to pass, I would say that the Court will have lost its strength and will no longer be a real force in the affairs of our country. But so long as it is manned by men like those who have preceded us and by others like those who sit today, I have no fear of that ever happening.

I am happy today to leave the service of my country with a feeling of deep friendship for all these men whom I have served with for 16 years, in spite of the fact that we have disagreed on many occasions. In the last analysis, the fact we have often disagreed is not of great importance. The important thing is that every man will have given his best thought and consideration to the great problems that have confronted us.

It was ordered by the Court that the accompanying correspondence between members of the Court and Mr. Chief Justice Warren upon his retirement as Chief Justice of the United States be this day spread upon the minutes and that it also be printed in the United States Reports.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., June 23, 1969.

Hon. EARL WARREN,
Chief Justice of the United States,
Washington, D. C.

DEAR CHIEF:

Your retirement today from our Court brings us mingled feelings—regret that you are leaving and gratitude that you have served the Court and the Nation with such eminent distinction.

We, your brethren, cannot let you leave without expressing our admiration and affection for you. Through our years of service together we have been constantly impressed by your patriotism and your unswerving devotion to liberty and justice. For us it is a source of pride that we have had the opportunity to be members of the Court over which you have presided during one of the most important and eventful eras of our Nation.

We are happy that you leave the Court in good health and wish you many more years of health and happiness in your well-earned retirement.

Sincerely,

HUGO L. BLACK
W. O. DOUGLAS
JOHN M. HARLAN
WM. J. BRENNAN, JR.
POTTER STEWART
BYRON R. WHITE
THURGOOD MARSHALL

SUPREME COURT OF THE UNITED STATES,
Washington D. C., June 23, 1969.

DEAR BRETHREN:

Your letter of today concerning my retirement was heartwarming for me.

To have been able to serve with you through these many eventful years is one of the great satisfactions of my life, and to retire with the friendship of all of you fills my cup to overflowing.

I shall always be interested in you and your work, and I trust that each of you will, for many years, enjoy continued good health and happiness.

Sincerely,

EARL WARREN.

MR. JUSTICE BLACK
MR. JUSTICE DOUGLAS
MR. JUSTICE HARLAN
MR. JUSTICE BRENNAN
MR. JUSTICE STEWART
MR. JUSTICE WHITE
MR. JUSTICE MARSHALL

APPOINTMENT OF MR. CHIEF JUSTICE BURGER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 23, 1969.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL.

THE CHIEF JUSTICE [after making the statement set forth, *ante*, p. X] said:

So I leave in a happy vein, Mr. President, and I wish my successor all the happiness and success in his years on the Court, which I hope will be many. You having issued a commission to him, it becomes my very happy duty and pleasure to administer the oath to him.

But before doing so, I want to say:

All cases submitted and all business before the Court at this Term in readiness for disposition having been disposed of,

It is ordered by this Court that all cases on the docket be, and they are hereby, continued to the next Term.

The Clerk will now read the Commission of the Chief Justice-designate.

The Clerk then read the commission as follows:

RICHARD NIXON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Warren E. Burger of Virginia, I have nominated, and, by and with

the advice and consent of the Senate, do appoint him Chief Justice of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Warren E. Burger, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this twenty-third day of June, in the year of our Lord one thousand nine hundred and sixty-nine, and of the independence of the United States of America the one hundred and ninety-third.

[SEAL] RICHARD NIXON.

By the President:

JOHN N. MITCHELL,
Attorney General.

Judge Burger was then escorted by the Marshal to the center of the bench where the oath of office was administered by the CHIEF JUSTICE in the following words:

I, Warren Earl Burger, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Chief Justice of the United States, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and alle-

giance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

WARREN E. BURGER.

Subscribed and sworn to before me this twenty-third day of June, 1969.

EARL WARREN,
Chief Justice.

THE CHIEF JUSTICE said:

I present the new Chief Justice of the United States.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1968.

UNITED STATES *v.* KING.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 672. Argued April 2, 1969.—Decided May 19, 1969.

The jurisdiction of the Court of Claims is limited to money claims against the United States and that court does not have the authority to issue declaratory judgments. Pp. 2–5.

182 Ct. Cl. 631, 390 F. 2d 894, reversed.

Assistant Attorney General Ruckelshaus argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Harris Weinstein,* and *Morton Hollander.*

Neil B. Kabatchnick argued the cause for respondent. With him on the brief was *Richard H. Love.*

Warner W. Gardner and *Benjamin W. Boley* filed a brief for the Liner Council, American Institute of Merchant Shipping, as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Colonel John P. King, respondent, was retired from the Army for longevity (length of service) over his objection that he should have been retired for physical disability. Had his retirement been based on disability, Colonel King

would have been entitled to an exemption from income taxation allowed by § 104 (a)(4) of the Internal Revenue Code of 1954, 26 U. S. C. § 104 (a)(4). He brought this action in the Court of Claims alleging that the Secretary of the Army's action in rejecting his disability retirement was arbitrary, capricious, not supported by evidence, and therefore unlawful, and asked for a judgment against the United States for an amount of excess taxes he had been compelled to pay because he had been retired for longevity instead of disability. The Court of Claims agreed with the United States that the claim as filed was basically one for a refund of taxes and was therefore barred by King's failure to allege that he had filed a timely claim for refund as required by 26 U. S. C. § 7422 (a). In this situation, the court suggested to counsel that it might have jurisdiction under the Declaratory Judgment Act and requested that briefs and arguments on this point be submitted to the court. This was done. The Court of Claims, in an illuminating and interesting opinion by Judge Davis, reached the conclusion that the court could exercise jurisdiction under the Declaratory Judgment Act, 28 U. S. C. § 2201. In so holding, the court thereby rejected the Government's contentions that the Declaratory Judgment Act does not apply to the Court of Claims and that the court's jurisdiction is limited to actions asking for money judgments. By this ruling the court expressly declined to follow a long line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655 (1935). As the opinion of Judge Davis showed, the question of whether the Court of Claims has jurisdiction to issue declaratory judgments is both substantial and important. We granted certiorari to decide that question.

The Court of Claims was established by Congress in 1855. Throughout its entire history up until the time that this case was filed, its jurisdiction has been limited

to money claims against the United States Government. In 1868 this Court held that "the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner." *United States* v. *Alire,* 6 Wall. 573, 575. In *United States* v. *Jones,* 131 U. S. 1, this Court reaffirmed this view of the limited jurisdiction of the Court of Claims, and held that the passage of the Tucker Act in 1887 had not expanded that jurisdiction to equitable matters. More recently, in 1962, it was said in the prevailing opinion in *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 557, on a point not disputed by any of the other members of the Court that "[f]rom the beginning [the Court of Claims] has been given jurisdiction only to award damages . . . ." No amendment purporting to increase the jurisdiction of the Court of Claims has been enacted since the decision in *Zdanok.*

The foregoing cases decided by this Court therefore clearly show that neither the Act creating the Court of Claims nor any amendment to it grants that court jurisdiction of this present case. That is true because Colonel King's claim is not limited to actual, presently due money damages from the United States. Before he is entitled to such a judgment he must establish in some court that his retirement by the Secretary of the Army for longevity was legally wrong and that he is entitled to a declaration of his right to have his military records changed to show that he was retired for disability. This is essentially equitable relief of a kind that the Court of Claims has held throughout its history, up to the time this present case was decided, that it does not have the power to grant.

It is argued, however, that even if the Court of Claims Act with its amendments did not grant that court the authority to issue declaratory judgments, it was given that authority by the Declaratory Judgment Act of 1934. Support for this proposition is drawn from the language in

the Declaratory Judgment Act that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." The first answer to this contention is that, as we have pointed out, cases seeking relief other than money damages from the Court of Claims have never been "within its jurisdiction." And we agree with the opinion of the Court of Claims in this case that the legislative history materials concerning the application of this Act to the Court of Claims "are, at best, ambiguous." For the court below, it was sufficient that there was no clear indication that Congress affirmatively intended to exclude the Court of Claims from the scope of the Declaratory Judgment Act. We think that this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed. *United States* v. *Sherwood*, 312 U. S. 584. This was precisely the position taken by the Court of Claims in a line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655 (1935). In that case, decided soon after the passage of the Declaratory Judgment Act, the Court of Claims held that it would require a specific and express statute of Congress to give the Court of Claims the power to issue declaratory judgments. The Court of Claims said in *Twin Cities* that:

> "If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general

> provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised." 81 Ct. Cl., at 658.

We think that the earlier decisions of the Court of Claims and those that have consistently followed them were correct. There is not a single indication in the Declaratory Judgment Act or its history that Congress, in passing that Act, intended to give the Court of Claims an expanded jurisdiction that had been denied to it for nearly a century. In the absence of an express grant of jurisdiction from Congress, we decline to assume that the Court of Claims has been given the authority to issue declaratory judgments.

Reversed.

LEARY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 65. Argued December 11–12, 1968.—Decided May 19, 1969.

Petitioner, accompanied by his daughter, son, and two others, on an automobile trip from New York to Mexico, after apparent denial of entry into Mexico, drove back across the International Bridge into Texas, where a customs officer through a search discovered some marihuana in the car and on petitioner's daughter's person. Petitioner was indicted under 26 U. S. C. § 4744 (a)(2), a subsection of the Marihuana Tax Act, and under 21 U. S. C. § 176a. At petitioner's trial, which resulted in his conviction, petitioner admitted acquiring the marihuana in New York (but said he did not know where it had been grown) and driving with it to Laredo, Texas, thence to the Mexican customs station, and back to the United States. The Marihuana Tax Act levies an occupational tax upon all those who "deal in" the drug and provides that the taxpayer must register his name and place of business with the Internal Revenue Service. The Act imposes a transfer tax "upon all transfers of marihuana" required to be effected with a written order form, and all except a limited number of clearly lawful transfers must be effected with such a form. The Act further imposes a transfer tax of $1 per ounce on a registered transferee and $100 per ounce on an unregistered transferee. The forms, executed by the transferee, must show the transferor's name and address and the amount of marihuana involved. A copy of the form is "preserved" by the Internal Revenue Service and the information contained in the form is made available to law enforcement officials. Possession of marihuana is a crime in Texas, where petitioner was arrested, in New York, where petitioner asserted the transfer occurred, and in all the other States. Section 4744 (a)(2) prohibits transportation or concealment of marihuana by one who acquired it without having paid the transfer tax, which petitioner conceded that he had not done. Petitioner claimed in his motion for a new trial that his conviction under the Marihuana Tax Act violated his privilege against self-incrimination, and he argues that this Court's subsequent decisions in *Marchetti* v. *United States*, 390 U. S. 39, *Grosso* v. *United States*, 390 U. S. 62, and *Haynes* v. *United*

States, 390 U. S. 85, require reversal. The Government contends that the Act's transfer tax provisions do not compel incriminatory disclosures because, as administratively construed and applied, they permit prepayment of the tax only by persons whose activities are otherwise lawful. Title 21 U. S. C. § 176a makes it a crime to transport or facilitate the transportation of illegally imported marihuana, with knowledge of its illegal importation, and provides that a defendant's possession of marihuana shall be deemed sufficient evidence that the marihuana was illegally imported or brought into the United States, and that the defendant knew of the illegal importation or bringing in, unless the defendant explains his possession to the satisfaction of the jury. The trial court instructed the jury that it might find petitioner guilty of violating § 176a, (1) solely on petitioner's testimony that the marihuana had been brought back from Mexico into the United States and that with knowledge of that fact petitioner had continued to transport it, or (2) partly upon his testimony that he had transported the marihuana from New York to Texas and partly upon the § 176a presumption. Petitioner contends that application of that presumption denied him due process of law. *Held:*

1. Petitioner's invocation of the privilege against self-incrimination under the Fifth Amendment provided a full defense to the charge under 26 U. S. C. § 4744 (a)(2). Pp. 12–29.

(a) Since the effect of the Act's terms were such that legal possessors of marihuana were virtually certain to be registrants or exempt from the order form requirement, compliance with the transfer tax provisions would have required petitioner as one not registered but obliged to obtain an order form unmistakably to identify himself as a member of a "selective group inherently suspect of criminal activities," and thus those provisions created a "real and appreciable" hazard of incrimination within the meaning of *Marchetti, Grosso,* and *Haynes*. Pp. 16–18.

(b) It is clear from both the language of the Act and its legislative history that, contrary to the interpretation which the Government would give to the transfer provisions, Congress intended that a nonregistrant should be able to obtain an order form and prepay the transfer tax. Pp. 18–26.

(c) Since the Act was clearly aimed at bringing to light violations of the marihuana laws, this Court will not impose restrictions upon the use of information revealed by the transfer provisions in order to avoid the constitutional issue. Pp. 26–27.

(d) Petitioner's claim of the privilege was timely and, under the circumstances of this case, his failure to assert the privilege at the trial (which antedated this Court's decisions in *Marchetti*, *Grosso*, and *Haynes*) did not constitute a waiver. Pp. 27–28.

(e) By taking the stand petitioner waived his right to remain silent at trial but not, as the Court of Appeals erroneously held, his right to plead that the Act violated the privilege against self-incrimination; nor was the latter right waived by his testifying that his noncompliance with the Act had a religious motivation, since other parts of his testimony indicated that he was also influenced by an apprehension that by trying to pay the tax he might incriminate himself. Pp. 27–29.

2. In the circumstances of this case, the application of that part of the presumption in 21 U. S. C. § 176a which provides that a possessor of marihuana is deemed to know of its unlawful importation denied petitioner due process of law in violation of the Fifth Amendment. Pp. 29–53.

(a) The jury, under the trial court's instructions, might have convicted petitioner with the aid of the § 176a presumption, and petitioner is not foreclosed from challenging the constitutionality of that presumption because the jury might have based its verdict on the alternative theory in those instructions which did not rest upon that presumption. When a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside. See *Stromberg* v. *California*, 283 U. S. 359. Pp. 30–32.

(b) A criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Tot* v. *United States*, 319 U. S. 463. Pp. 32–36.

(c) Even if it assumed that the great preponderance of marihuana used in the United States is smuggled from Mexico and that the inference of illegal importation is therefore justified, it does not under the *Tot* test follow (since a significant amount may not have been imported at all) that a majority of marihuana possessors "know" that their marihuana was illegally imported, and the inference of knowledge is therefore impermissible unless it appears on the basis of available materials that most such possessors are aware either of the high rate of importation or that *their* marihuana was grown abroad. Pp. 39–47.

(d) A possessor of marihuana might "know" that his marihuana came from abroad in any one of five ways: (1) he might be aware of the proportion of domestically consumed marihuana smuggled from abroad and deduce that his was illegally imported; (2) he might have smuggled it himself; (3) he might have learned indirectly that the marihuana supplied in his locality came from abroad; (4) he might have specified foreign marihuana when making his purchase; (5) he might be able to tell the source of the marihuana from its appearance, packaging, or taste. Neither the legislative record nor other sources establish with substantial assurance that even a majority of marihuana possessors have learned the source of their marihuana in one or more of these ways. Pp. 47–52.

383 F. 2d 851, 392 F. 2d 220, reversed in part and reversed and remanded in part.

Robert J. Haft argued the cause and filed briefs for petitioner.

John S. Martin, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg.*

Briefs of *amici curiae* urging reversal were filed by *Jonathan Sobeloff* and *Melvin L. Wulf* for the American Civil Liberties Union, and by *Joseph S. Oteri* for the National Student Assn.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents constitutional questions arising out of the conviction of the petitioner, Dr. Timothy Leary, for violation of two federal statutes governing traffic in marihuana.

The circumstances surrounding petitioner's conviction were as follows. On December 20, 1965, petitioner left New York by automobile, intending a vacation trip to Yucatan, Mexico. He was accompanied by his daughter and son, both teenagers, and two other persons. On

December 22, 1965, the party drove across the International Bridge between the United States and Mexico at Laredo, Texas. They stopped at the Mexican customs station and, after apparently being denied entry, drove back across the bridge. They halted at the American secondary inspection area, explained the situation to a customs inspector, and stated that they had nothing from Mexico to declare. The inspector asked them to alight, examined the interior of the car, and saw what appeared to be marihuana seeds on the floor. The inspector then received permission to search the car and passengers. Small amounts of marihuana were found on the car floor and in the glove compartment. A personal search of petitioner's daughter revealed a silver snuff box containing semi-refined marihuana and three partially smoked marihuana cigarettes.

Petitioner was indicted and tried before a jury in the Federal District Court for the Southern District of Texas, on three counts. First, it was alleged that he had knowingly smuggled marihuana into the United States, in violation of 21 U. S. C. § 176a.[1] Second, it was charged

[1] Insofar as here relevant, § 2 (h) of the Narcotic Drugs Import and Export Act, 70 Stat. 570, 21 U. S. C. § 176a, provides:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned . . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

that he had knowingly transported and facilitated the transportation and concealment of marihuana which had been illegally imported or brought into the United States, with knowledge that it had been illegally imported or brought in, all again in violation of § 176a.[2] Third, it was alleged that petitioner was a transferee of marihuana and had knowingly transported, concealed, and facilitated the transportation and concealment of marihuana, without having paid the transfer tax imposed by the Marihuana Tax Act, 26 U. S. C. § 4741 *et seq.*, thereby violating 26 U. S. C. § 4744 (a)(2).[3]

After both sides had presented their evidence and the defense had moved for a judgment of acquittal, the District Court dismissed the first or smuggling count.[4] The jury found petitioner guilty on the other two counts. He was tentatively sentenced to the maximum punishment, pending completion of a study and recommendations to be used by the District Court in fixing his final sentence.[5] On appeal, the Court of Appeals for the

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[2] See n. 1, *supra*.

[3] Insofar as here relevant, 26 U. S. C. § 4744 (a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

"(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

"(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained."

The statutory scheme of the Marihuana Tax Act is analyzed in more detail at 14–16, *infra*.

[4] Petitioner had testified without contradiction that he had obtained the marihuana in New York, and the District Court apparently reasoned that an article taken out of the United States could not be "smuggled" back into the country, as charged by the indictment. See Appendix 60a; 2 Transcript of Record 520, 523–526; cf. *United States* v. *Claybourn*, 180 F. Supp. 448, 451–452 (1960).

[5] See 18 U. S. C. § 4208. Petitioner was tentatively sentenced to 20 years in prison and a $20,000 fine for violation of § 176a, and to

Fifth Circuit affirmed. 383 F. 2d 851 (1967). That court subsequently denied a petition for rehearing and rehearing *en banc*. 392 F. 2d 220 (1968).

We granted certiorari, 392 U. S. 903 (1968), to consider two questions: (1) whether petitioner's conviction for failing to comply with the transfer tax provisions of the Marihuana Tax Act violated his Fifth Amendment privilege against self-incrimination; (2) whether petitioner was denied due process by the application of the part of 21 U. S. C. § 176a which provides that a defendant's possession of marihuana shall be deemed sufficient evidence that the marihuana was illegally imported or brought into the United States, and that the defendant knew of the illegal importation or bringing in, unless the defendant explains his possession to the satisfaction of the jury. For reasons which follow, we hold in favor of the petitioner on both issues and reverse the judgment of the Court of Appeals.

I.

We consider first petitioner's claim that his conviction under the Marihuana Tax Act violated his privilege against self-incrimination.

A.

Petitioner argues that reversal of his Marihuana Tax Act conviction is required by our decisions of last Term in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968). In *Marchetti*, we held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as re-

10 years in prison and a $20,000 fine for violation of § 4744 (a)(2) (see 26 U. S. C. § 7237 (a)), the prison sentences to run consecutively. The lowest penalty for conviction under § 176a is five years' imprisonment, and no suspension of sentence, probation, or parole is permitted following such a conviction. See 26 U. S. C. § 7237 (d).

quired by 26 U. S. C. §§ 4411–4412. We noted that wagering was a crime in almost every State, and that 26 U. S. C. § 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. We concluded that compliance with the statute would have subjected petitioner to a " 'real and appreciable' "[6] risk of self-incrimination. We further recognized that the occupational tax was not imposed in " 'an essentially non-criminal and regulatory area . . . ,' " 390 U. S., at 57,[7] but was "directed to a 'selective group inherently suspect of criminal activities.' "[8] We found that it would be inappropriate to impose restrictions on use of the information collected under the statute—a course urged by the Government as a means of removing the impact of the statute upon the privilege against self-incrimination—because of the evident congressional purpose to provide aid to prosecutors. We noted that, unlike the petitioner in *Shapiro* v. *United States,* 335 U. S. 1 (1948), Marchetti was not required to supply information which had a "public aspect" or was contained in records of the kind he customarily kept.

In *Grosso,* we held that the same considerations required that a claim of the privilege be a defense to prosecution under 26 U. S. C. § 4401, which imposes an excise tax on proceeds from wagering. And in *Haynes* we held for the same reasons that assertion of the Fifth Amendment privilege provided a defense to prosecution for possession of an unregistered weapon under the National Firearms Act, 26 U. S. C. § 5851, despite the fact that in "uncommon" instances registration under the statute would not be incriminating. See 390 U. S., at 96–97, 99.

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[6] 390 U. S., at 48, quoting from *Reg.* v. *Boyes,* 1 B. & S. 311, 330 (1861).

[7] 390 U. S., at 57, quoting from *Albertson* v. *SACB,* 382 U. S. 70, 79 (1965).

[8] *Ibid.*

B.

In order to understand petitioner's contention that compliance with the Marihuana Tax Act would have obliged him to incriminate himself within the meaning of the foregoing decisions, it is necessary to be familiar with the statutory scheme. The Marihuana Tax Act has two main subparts. The first imposes a tax on transfers of marihuana, the second an occupational tax upon those who deal in the drug. It is convenient to begin with the occupational tax provisions, 26 U. S. C. §§ 4751–4753.

Section 4751 provides that all persons who "deal in" marihuana shall be subject to an annual occupational tax. Subsections require that specified categories of persons, such as importers, producers, physicians, researchers, and millers pay varying rates of tax per year. See §§ 4751 (1)–(4), (6). Persons who "deal in" marihuana but do not fall into any of the specified categories are required to pay $3 per year. See § 4751 (5). Section 4753 provides that at the time of paying the tax the taxpayer must "register his name or style and his place or places of business" at the nearest district office of the Internal Revenue Service.

The first of the transfer tax provisions, 26 U. S. C. § 4741, imposes a tax "upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms." Section 4741 further provides that on transfers to persons registered under § 4753 the tax is $1 per ounce, while on transfers to persons not so registered the tax is $100 per ounce. The tax is required to be paid by the transferee "at the time of securing each order form." [9] With certain exceptions not here relevant,[10] § 4742 makes it unlawful for any

[9] The transferor is secondarily liable for the tax. See 26 U. S. C. § 4741 (b).

[10] The exceptions include transfers by or under prescription of a medical practitioner; legal exportation to foreign countries; trans-

person, "whether or not required to pay a special tax and register under sections 4751 to 4753," to transfer marihuana except pursuant to a written order form to be obtained by the transferee. A regulation, 26 CFR § 152.69, provides that the order form must show the name and address of the transferor and transferee; their § 4753 registration numbers, if they are registered; and the quantity of marihuana transferred. Another regulation, 26 CFR § 152.66, requires the transferee to submit an application containing these data in order to obtain the form. Section 4742 (d) of the Act requires the Internal Revenue Service to "preserve" in its records a duplicate copy of each order form which it issues.

Another statutory provision, 26 U. S. C. § 4773, assures that the information contained in the order form will be available to law enforcement officials. That section provides that the duplicate order forms required to be kept by the Internal Revenue Service shall be open to inspection by Treasury personnel and state and local officials charged with enforcement of marihuana laws, and that upon payment of a fee such officials shall be furnished copies of the forms.[11]

Finally, 26 U. S. C. § 4744 (a) makes it unlawful for a transferee required to pay the § 4741 (a) transfer tax either to acquire marihuana without having paid the tax or to transport, conceal, or facilitate the transportation or concealment of, any marihuana so acquired.[12] Peti-

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fers to government officials; and transfers of marihuana seeds to persons registered under § 4753.

[11] 26 U. S. C. § 6107, which requires that a list of "persons who have paid special taxes" under subtitles D and E of the Internal Revenue Code be kept for public inspection in each principal Internal Revenue office and that the list be furnished to state and local prosecutors on request, apparently does not apply to payors of transfer taxes. See *Haynes* v. *United States*, 390 U. S. 85, 99–100 (1968).

[12] The relevant text of § 4744 (a) is set out in n. 3, *supra*.

tioner was convicted under § 4744 (a). He conceded at trial that he had not obtained an order form or paid the transfer tax.

C.

If read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself to a "real and appreciable" risk of self-incrimination, within the meaning of our decisions in *Marchetti, Grosso,* and *Haynes.* Sections 4741–4742 required him, in the course of obtaining an order form, to identify himself not only as a transferee of marihuana but as a transferee who had not registered and paid the occupational tax under §§ 4751–4753. Section 4773 directed that this information be conveyed by the Internal Revenue Service to state and local law enforcement officials on request.

Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marihuana "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" [13] under the state marihuana laws then in effect.[14] When petitioner failed to comply with the Act, in late 1965, possession of any quantity of marihuana was apparently a crime in every one of the 50 States, including New York, where petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted.[15] It is

[13] *Marchetti* v. *United States,* 390 U. S. 39, 48 (1968).

[14] It is also possible that compliance with the Act also would have created a substantial risk of incrimination under 21 U. S. C. § 176a, the other federal statute which petitioner was convicted of violating (the relevant text of § 176a is reproduced in n. 1, *supra*). However, the danger of incrimination under state law is so plain that this possibility need not be explored further.

[15] At the time petitioner failed to comply with the Act, 48 States and the District of Columbia had on their books in some form essentially the provisions of the Uniform Narcotic Drug Act. See 9B Uniform Laws Ann. 409–410 (1966). Section 2 of that Act states: "It shall be unlawful for any person to . . . possess . . . any narcotic

true that almost all States, including New York and Texas, had exceptions making lawful, under specified conditions, possession of marihuana by: (1) state-licensed manufacturers and wholesalers; (2) apothecaries; (3) researchers; (4) physicians, dentists, veterinarians, and certain other medical personnel; (5) agents or employees of the foregoing persons or common carriers; (6) persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person; and (7) certain public officials.[16] However, individuals in the first four of these classes are among those compelled to register and pay the occupational tax under §§ 4751–4753;[17] in consequence of having registered, they are required to pay only a $1 per ounce transfer tax under § 4741 (a)(1). It is extremely unlikely that such persons will remain unregistered, for failure to register renders them liable not only to an additional $99 per ounce transfer tax but

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drug, except as authorized in this act." Section 1 (14) defines "narcotic drugs" to include marihuana ("cannabis"). The remaining two States, California and Pennsylvania, also have statutes making it a crime to possess marihuana. See Cal. Health & Safety Code § 11530 (1964); Pa. Stat. Ann., Tit. 35, §§ 780–2 (g), 780–4 (q) (1964).

In 1965, New York and Texas had in effect statutory provisions substantially identical to the above sections of the Uniform Act. For New York, see N. Y. Pub. Health Law §§ 3301, subd. 38 (Supp. 1968–1969), 3305 (1954); for Texas, see Tex. Pen. Code, Art. 725b, §§ 1 (14), 2 (1961). In New York possession of any amount of marihuana was a misdemeanor punishable by up to a year's imprisonment. See N. Y. Pen. Law § 1751–a (1) (Supp. 1966). See also *id.*, § 1751, subd. 2 (Supp. 1966). In Texas, such possession was a felony punishable by imprisonment for not less than two years and not more than life. See Tex. Pen. Code, Art. 725b, § 23 (1) (1961).

[16] See, *e. g.*, Uniform Narcotic Drug Act §§ 3–11, 9B Uniform Laws Ann. 472–496 (1966); N. Y. Pub. Health Law §§ 3310, 3320–3325, 3330–3333 (1954 and Supp. 1968–1969); Tex. Pen. Code, Art. 725b, §§ 5–12 (1961).

[17] See 26 U. S. C. §§ 4751 (1)–(6).

also to severe criminal penalties.[18] Persons in the last three classes mentioned above appear to be wholly exempt from the order form and transfer tax requirements.[19]

Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were virtually certain either to be registered under § 4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a "selective group inherently suspect of criminal activities." Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this "selective" and "suspect" group, we can only decide that when read according to their terms these provisions created a "real and appreciable" hazard of incrimination.

D.

The Government, however, vigorously contends that when the Act is considered together with the accompanying regulations, and in light of existing administrative practice, its incriminatory aspect will be seen to vanish or shrink to less than constitutional proportions. The Government points first to regulations, 26 CFR §§ 152.22, 152.23, added in 1964, which provide that every applicant for registration under §§ 4751–4753

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[18] See 26 U. S. C. §§ 4755 (a)(1), 7237 (a).

[19] 26 U. S. C. §§ 4742 (b)(1)–(2) exempt persons who receive marihuana under medical prescription or directly from a medical practitioner. Title 26 U. S. C. § 4742 (b)(4) exempts transfers to public officials. And the design of the Act strongly suggests that a delivery of marihuana to an employee or agent of a registrant is considered a "transfer" to the registrant himself, see 26 U. S. C. § 4755 (b)(3), 26 CFR §§ 152.41, 152.42, and that delivery to a common carrier is considered a "transfer" to the addressee. See 26 U. S. C. § 4755 (b)(2), 26 CFR § 152.127 (c).

must show that he is legally qualified to deal in marihuana according to the laws of the jurisdiction in which he is operating, and that the district director shall not permit an applicant to register until the director is satisfied that this is true. The Government then cites two other regulations, relating to applications for order forms under § 4742. The first, 26 CFR § 152.67, provides that such applications "[g]enerally . . . shall be signed by the same person or persons signing the application for registration," but when this is impracticable "they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications . . . has previously been filed . . . ." The second regulation, 26 CFR § 152.68, states that upon receipt of an application the district director "shall" compare the signature on the application "with that appearing on the application for registration or in the power of attorney," and that "[u]nless the district director is satisfied that the application is authentic it will not be honored."

The Government asserts that these regulations clearly signify that no person will be permitted to register unless his activities are permissible under the law of his jurisdiction, and that no one will be permitted to obtain an order form and prepay the transfer tax unless he has registered.[20] The result, the Government contends, is simply to prohibit nonregistrants like petitioner from dealing in marihuana at all. The Government further asserts that the administrative practice of the Internal Revenue Service and the Bureau of Narcotics has always been consistent with this interpretation, though it concedes that there apparently has never been an attempt by

[20] The Government argues that the $100 per ounce tax was intended to be collected only *civilly* from those found to have engaged in illegal transfers. See Brief for the United States 19, n. 23, and 29. See also *United States* v. *Sanchez*, 340 U. S. 42 (1950).

a nonregistrant to prepay the tax. The Government does admit uncertainty as to whether the fact of such an attempt would have been communicated to law enforcement officials; however, it points out that nothing in the statute or regulations appears to compel such disclosure.[21] The Government argues that the regulations and administrative practice effectively refute the existence of a substantial hazard of incrimination at the time petitioner acquired marihuana: first, because a nonregistrant would have known that he could not obtain an order form and consequently never would have applied; second, because there was no substantial risk that an unsuccessful application would have been brought to the attention of law enforcement officials.

We cannot accept the Government's argument, for we find that Congress did intend that a nonregistrant should be able to obtain an order form and prepay the transfer tax. This congressional intent appears both from the language of the Act and from its legislative history.

We begin with the words of the statute. Section 4741 (a), when read in conjunction with § 4742, imposes a tax upon every transfer of marihuana, with a few exceptions not here relevant.[22] Section 4741 (a)(1) states that the tax on registrants shall be $1 per ounce and § 4741 (a)(2) that the tax on transfers to nonregistrants shall be $100 per ounce. Section 4741 (b) states that "[*s*]*uch tax shall be paid by the transferee at the time of securing each order form* and shall be in addition to the price of such form." (Emphasis added.) Since § 4741 (b) makes no distinction between the § 4741 (a)(1) tax on transfers to registrants and the § 4741 (a)(2) tax

[21] After our decisions in *Marchetti, Grosso,* and *Haynes,* district directors were instructed that applications by nonregistrants should not be disclosed but simply returned to the applicants. See Brief for the United States 17, n. 16.

[22] See n. 10, *supra.*

on transfers to nonregistrants, it seems clear that Congress contemplated that nonregistrant as well as registrant transferees should be able to obtain order forms and prepay the tax.

The legislative history also strongly indicates that the Act was intended merely to impose a very high tax on transfers to nonregistrants and not to prohibit such transfers entirely. As a taxing measure, the bill of course originated in the House of Representatives. At the start of the first hearing on the bill, before the House Ways and Means Committee, the committee chairman announced that he had introduced the bill at the request of the Secretary of the Treasury.[23] The transfer provisions of the bill then read essentially as they do now.[24] The first witness to appear before the Committee was the Treasury Department's Assistant General Counsel, Clinton M. Hester. He began by stating that the bill's purpose was "not only to raise revenue from the marihuana traffic, but also to discourage the current and widespread undesirable use of marihuana by smokers and drug addicts . . . ."[25] He stated that in form the bill was a "synthesis" of the Harrison Narcotics Act, now 26 U. S. C. § 4701 *et seq.*, and the National Firearms Act, now 26 U. S. C. § 5801 *et seq.*[26] Both of these statutes compelled dealers in the respective goods to register and pay a special tax. Both prohibited transfer except in pursuance of a written form and imposed a transfer tax. However, the transfer provisions differed in that the Narcotics Act provided that no one except a registrant could legally obtain an order form, see 26 U. S. C. § 4705 (g), while the Firearms Act merely im-

[23] See Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 5 (1937).

[24] See *id.*, at 3–5.

[25] *Id.*, at 7.

[26] *Ibid.*

posed a $200 tax upon each transfer of a firearm covered by the Act.

The Treasury witness explained that the marihuana tax bill generally followed the plan of the Narcotics Act insofar as it required dealers in marihuana to register and prohibited transfers except by order form. But he testified that because of constitutional doubts:

> "[a]t this point, this bill, like the National Firearms Act, departs from the plan of the Harrison Narcotic Act which limits the right to purchase narcotic drugs to those persons who are permitted to register under that act. . . .
>
> "[I]n order to obviate the possibility of [an] attack upon the constitutionality of this bill, it, like the National Firearms Act, permits the transfer of marihuana to nonregistered persons upon the payment of a heavy transfer tax. The bill would permit the transfer of marihuana to anyone, but would impose a $100 per ounce tax upon a transfer to a person who might use it for purposes which are dangerous and harmful to the public . . . ." [27]

Mr. Hester was also the first witness before a subcommittee of the Senate Finance Committee. There he testified in less detail, stating at different points that the purpose of the transfer provisions was "to discourage the widespread use of the drug by smokers and drug addicts," [28] "to render extremely difficult the acquisition of

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[27] Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 9 (1937). The doubts about the bill's constitutionality were occasioned by the dissenting opinions in *United States* v. *Doremus*, 249 U. S. 86, 95 (1919), and *Nigro* v. *United States*, 276 U. S. 332, 354, 357 (1928). See Hearings on H. R. 6385, *supra*, at 9.

[28] Hearings on H. R. 6906 before a subcommittee of the Senate Committee on Finance, 75th Cong., 1st Sess., 5 (1937).

marihuana by persons who desire it for illicit uses," [29] "to prevent transfers to persons who would use marihuana for undesirable purposes," [30] and "through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses." [31]

The House and Senate reports describe the purposes of the transfer provisions largely in the language of Mr. Hester's testimony. The House report declares that the purpose was "to discourage the widespread use of the drug by smokers and drug addicts," [32] to "render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses," [33] and "through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses." [34] In discussing the issue of constitutionality, the report recites that "[t]he law is . . . settled that Congress has the power to enact a tax which is so heavy as to discourage the transactions or activities taxed" [35] and states that "[t]hese cases sustain the $100 tax imposed . . . upon transfers . . . to unregistered persons." [36] The Senate report, without discussing constitutionality, otherwise states the purpose of the transfer provisions in the very same words as the House report.[37] Thus, the committee reports confirm Mr. Hester's account of the bill's purposes. In short, the legislative history fully accords with the statutory language.

Upon this evidence, we have no hesitation in concluding that the interpretation which the Government would

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[29] *Id.*, at 6.
[30] *Ibid.*
[31] *Id.*, at 7.
[32] H. R. Rep. No. 792, 75th Cong., 1st Sess., 1 (1937).
[33] *Id.*, at 2.
[34] *Ibid.*
[35] *Id.*, at 3.
[36] *Ibid.*
[37] See S. Rep. No. 900, 75th Cong., 1st Sess., 2–3 (1937).

give to the transfer provisions is, contrary to the manifest congressional intent that transfers to nonregistrants be taxed, not forbidden. Insofar as the regulations which require comparison of signatures necessarily compel the result urged by the Government, they must be regarded as contrary to the statute and hence beyond the scope of the regulation-making authority which was delegated by Congress.[38] It is true that these regulations were promulgated in 1937, and that Congress re-enacted the entire Act in 1954, while they were in effect. However, the scanty legislative history accompanying that re-enactment gives no hint that Congress knew of these particular regulations, much less of the indirect impact which the Government now ascribes to them.[39] As we recently noted in *Massachusetts Trustees* v. *United States*, 377 U. S. 235, 241, 242 (1964), congressional re-enactment of a statute, even without any apparent knowledge of a particular regulation, can "strengthen

[38] The regulations, 26 CFR §§ 152.22, 152.23, see *supra*, at 18–19, which limit registration under § 4753 to persons whose marihuana dealings are legal under relevant state and local laws, do not of themselves require the result urged by the Government. In fact, there is strong support in the legislative history for the proposition that illicit consumers of marihuana like petitioner are not entitled to register. The House and Senate reports and the testimony of Mr. Hester before a subcommittee of the Senate Finance Committee all state, in identical language, that "[u]nder [the bill's] provisions all legitimate handlers of marihuana are required to pay occupational taxes . . . ." H. R. Rep. No. 792, 75th Cong., 1st Sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st Sess., 3 (1937); Hearings on H. R. 6906 before a subcommittee of the Senate Committee on Finance, 75th Cong., 1st Sess., 6 (1937). In his testimony before the House Ways and Means Committee, Mr. Hester stated explicitly that "those who would consume marihuana are not eligible to register under the bill . . . ." Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 8 (1937).

[39] See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 482–483 (1954).

to some extent" the regulation's claim to validity, but re-enactment cannot save a regulation which "contradict[s] the requirements" of the statute itself. When a regulation conflicts with the statute, the fact of subsequent re-enactment "is immaterial, for Congress could not add to or expand [the] statute by impliedly approving the regulation." *Commissioner* v. *Acker*, 361 U. S. 87, 93 (1959).[40]

Nor are we persuaded by the Government's argument that its construction has been followed by the Internal Revenue Service and the Bureau of Narcotics ever since the passage of the Act, and that this "long-standing" interpretation by the agencies charged with administering the Act should be controlling. We have often recognized that, as a general matter, a long-standing, contemporaneous construction of a statute by the administering agencies is "entitled to great weight," *FTC* v. *Mandel Bros.*, 359 U. S. 385, 391 (1959), and will be "show[n] great deference," *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).[41] However, in this instance the Government admits that until our decisions last Term in *Marchetti*, *Grosso*, and *Haynes*, the alleged interpretation had been made known only through the regulations themselves, since there apparently had never been an application by a nonregistrant to prepay the transfer tax. Moreover, in its brief in this Court in *United States* v. *Sanchez*, 340 U. S. 42 (1950), the United States plainly took the position that the Act imposed only a tax and not a prohibition on transfers to nonregistrants,[42] implying that at that time the alleged administrative construction was unknown even to those charged with representing the

[40] See also 1 K. Davis, Administrative Law Treatise § 5.07 (1958), and cases there cited.

[41] See generally *id.*, § 5.06.

[42] See Brief for the United States in No. 81, O. T. 1950, *United States* v. *Sanchez*, at 28–29.

United States in this Court. In these circumstances, the alleged administrative construction can furnish no additional support for the Government's argument.

The foregoing shows that at the time petitioner acquired marihuana he was confronted with a statute which on its face permitted him to acquire the drug legally, provided he paid the $100 per ounce transfer tax and gave incriminating information, and simultaneously with a system of regulations which, according to the Government, prohibited him from acquiring marihuana under any conditions. We have found those regulations so out of keeping with the statute as to be *ultra vires*. Faced with these conflicting commands, we think petitioner would have been justified in giving precedence to the higher authority: the statute.[43] "'[L]iteral and full compliance' with all the statutory requirements"[44] would have entailed a very substantial risk of self-incrimination. See *supra*, at 16–18.

The United States has not urged us, as it did in *Marchetti*, *Grosso*, and *Haynes*, to avoid this constitutional difficulty by placing restrictions upon the use of information gained under the transfer provisions. We declined to impose use restrictions in those cases because we found that the furnishing of information to interested prosecutors was a "significant element of Congress' purposes in adopting" the statutes there involved. *Marchetti* v. *United States*, *supra*, at 59 (1968).[45] The

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[43] Any other holding would give rise to additional knotty questions, such as whether petitioner's nonpayment of the transfer tax should be excused because of his actual or assumed reliance upon the erroneous administrative construction of the statute, under which he would not have been permitted to pay. Cf. *James* v. *United States*, 366 U. S. 213 (1961).

[44] *Grosso* v. *United States*, 390 U. S. 62, 65 (1968), quoting from *Albertson* v. *SACB*, 382 U. S. 70, 78 (1965).

[45] See also *Grosso* v. *United States*, *supra*, at 69; *Haynes* v. *United States*, *supra*, at 99–100 (1968).

text and legislative history of the Marihuana Tax Act plainly disclose a similar congressional purpose. As has been noted, 26 U. S. C. § 4773 requires that copies of order forms be kept available for inspection by state and local officials, and that copies be furnished to such officials on request. The House and Senate reports both state that one objective of the Act was "the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively." [46] In short, we think the conclusion inescapable that the statute was aimed at bringing to light transgressions of the marihuana laws. Hence, as in last Term's cases, we decline to impose use restrictions and are obliged to conclude that a timely and proper assertion of the privilege should have provided a complete defense to prosecution under § 4744 (a)(2).

E.

There remain the further questions whether this petitioner's claim of the privilege was timely and whether it was waived. As for timeliness, petitioner did not assert the privilege as a defense to the § 4744 (a) count until his motion for a new trial. The Court of Appeals evidently regarded the claim as timely, for it rejected it on the merits both in its original opinion and in its denial of rehearing. See 383 F. 2d, at 870; 392 F. 2d, at 221–222. The Government does not contend that the claim of the privilege was untimely. Petitioner's trial occurred before our decisions in *Marchetti, Grosso,* and *Haynes,* and the Court of Appeals for the Fifth Circuit had recently rejected an identical self-incrimination claim. See *Haynes* v. *United States,* 339 F. 2d 30 (1964). Although it would have been preferable for petitioner to have asserted the privilege at trial, we hold that in the circumstances of this case his failure to raise

[46] H. R. Rep. No. 792, 75th Cong., 1st Sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st Sess., 3 (1937).

the issue at that time did not amount to a waiver of the privilege. See *Grosso* v. *United States*, 390 U. S. 62, 70–71 (1968).

In denying Leary's petition for rehearing, the Court of Appeals, in addition to holding the privilege generally inapplicable to prosecutions under § 4744 (a), found that petitioner's claim of the privilege was improper because he "took the stand and affirmatively waived the privilege . . . by testifying fully to the details of his acquisition and transportation of marihuana without having paid the tax . . . ." 392 F. 2d, at 222. In relying for that proposition on the statement in *Marchetti* that our decision in that case would not provide a shield for any taxpayer who was "outside the privilege's protection," 390 U. S., at 61, we think the Court of Appeals misconceived the thrust of that dictum. The aspect of the self-incrimination privilege which was involved in *Marchetti*, and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Thus, petitioner is not asserting that he had a right to stand mute at his trial but that he cannot be convicted for having failed to comply with the transfer provisions of the Act at the time he acquired marihuana in 1965. His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim.

The Government suggests that petitioner waived his right to plead self-incrimination in yet another way, by testifying at trial that he had violated the statute for reasons entirely unrelated to fear of self-incrimination. It is true that some portions of petitioner's testimony indicate that his noncompliance was motivated, at least

in part, by his conviction that the Act imposed an illegal tax upon religion or upon the "pursuit of knowledge" [47] and by his belief that, in consequence of the system of regulations and administrative practice described above, he would not be permitted to pay the tax.[48] However, other parts of petitioner's testimony clearly indicate that he also was influenced by an apprehension that by trying to pay the tax he might incriminate himself.[49] We cannot say that petitioner's testimony, taken as a whole, amounted to a waiver of the privilege. We conclude that petitioner's invocation of the privilege was proper and that it should have provided a full defense to the third count of the indictment. Accordingly, we reverse petitioner's conviction under 26 U. S. C. § 4744 (a)(2).

II.

Next, we consider whether, in the circumstances of this case, the application of the presumption contained in 21 U. S. C. § 176a denied petitioner due process of law.

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[47] See Appendix 87a–88a, 89a.

[48] See Appendix 86a–89a. Of course, a holding that petitioner waived his right to plead self-incrimination by his reliance on the erroneous administrative interpretation would require consideration of the further question mentioned in n. 43, *supra:* whether such reliance should provide a defense.

[49] When first asked on direct examination why he had not paid the transfer tax, petitioner stated: "Well, I knew that I couldn't get such a permission. . . . I also know that if I had applied for such a [transfer tax] stamp I would probably subject myself to investigation . . . ." Appendix 86a. In response to a similar subsequent question, petitioner said: "I was very certain that I would not be able to pay the tax on the marihuana and that not only would it be taken away from me but I would be subjected to action." Appendix 87a. And when asked whether he had "an honest belief that you could not obtain [an order form]," petitioner replied: "I had a strong and honest belief that I could not get it and it would just cause a lot of publicity and trouble for both the government and myself. And I am not trying to cause trouble . . . ." Appendix 89a.

A.

Insofar as here relevant, § 176a imposes criminal punishment upon every person who:

> "knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law . . . , or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . ."

A subsequent paragraph establishes the presumption now under scrutiny:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

The second count of the indictment charged petitioner with having violated the "transportation" and "concealment" provisions of § 176a.[50] Petitioner admitted at trial that he had acquired marihuana in New York; had driven with it to Laredo, Texas; had continued across the bridge to the Mexican customs station; and then had returned to the United States. He further testified that he did not know where the marihuana he acquired had been grown.[51]

In view of this testimony, the trial court instructed the jury that it might find petitioner guilty of violating

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[50] As has been noted, the first count charged him with smuggling in violation of § 176a, but the District Court dismissed that count. See *supra*, at 11 and n. 4.

[51] See Appendix 90a.

§ 176a on either of two alternative theories. Under the first or "South-North" theory, a conviction could have been based solely upon petitioner's own testimony that the marihuana had been brought back from Mexico into the United States and that with knowledge of that fact petitioner had continued to transport it. Under the second or "North-South" theory, the conviction would have depended partly upon petitioner's testimony that he had transported the marihuana from New York to Texas and partly upon the challenged presumption.[52]

The Government contends that by giving testimony at trial which established all elements of the offense under the "South-North" theory, and by failing to object to the jury instructions on the ground now advanced, petitioner foreclosed himself from raising the point thereafter. We cannot agree. Even assuming that petitioner's testimony did supply all the evidence required for a valid conviction under the "South-North" theory, the jury nevertheless was told that it could alternatively convict with the aid of the presumption under the "North-South" theory. For all we know, the conviction did rest on that ground. It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that

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[52] With respect to this theory, the trial judge stated near the end of his charge to the jury:

"Now, you might have some difficulty with the question on Count 2 . . . .

"I mention this a second time because you might be confused about the question of importation.

"We are not talking necessarily about the importation or what the government contends was importation here at the bridge.

"The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury." Appendix 103a–104a.

the conviction be set aside. See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359 (1931).

It is true that petitioner did not object to the jury instructions on the basis of the presumption's alleged unconstitutionality.[53] However, he did rely upon that ground in his previous motion for a directed verdict at the close of the prosecution's case, and urged it again in his subsequent motion for a new trial.[54] Both motions were denied. The Court of Appeals considered petitioner's constitutional argument on the merits, and rejected it. See 383 F. 2d, at 868–870. In these circumstances, we conclude that the question is properly before us.[55]

B.

By what criteria is the constitutionality of the § 176a presumption to be judged?

Early decisions of this Court set forth a number of different standards by which to measure the validity of statutory presumptions.[56] However, in *Tot* v. *United*

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[53] See 2 Transcript of Record 612–614.

[54] See 1 Transcript of Record 198–200; 2 Transcript of Record 492, 649.

[55] We think it irrelevant that petitioner himself testified at trial that he had no knowledge of the marihuana's origin. The Government put in no affirmative evidence of knowledge, and the jury was instructed that it could convict under the "North-South" theory, relying upon the § 176a presumption to permit an inference of knowledge. The trial judge did not mention petitioner's testimony on this point in his instructions to the jury. Since the presumption is by its terms rebuttable, the intended implication must have been that the jury could convict on the basis of the presumption only if it disbelieved the testimony. Cf. *Caudillo* v. *United States*, 253 F. 2d 513, 518 (1958).

[56] One test was whether there was a "rational connection" between the basic fact and the presumed fact. See *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35 (1910); *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79 (1916); *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639 (1929); cf. *Yee Hem* v. *United States*, 268

States, 319 U. S. 463 (1943), the Court singled out one of these tests as controlling, and the *Tot* rule has been adhered to in the two subsequent cases in which the issue has been presented. The *Tot* Court had before it a federal statute [57] which, as construed, made it a crime for one previously convicted of a crime of violence to receive any firearm or ammunition in an interstate transaction. The statute further provided that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

The Court, relying upon a prior decision in a civil case,[58] held that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the fact presumed." 319 U. S., at 467. The Court stated:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the infer-

U. S. 178 (1925). A second was whether the legislature might have made it a crime to do the thing from which the presumption authorized an inference. See *Ferry* v. *Ramsey*, 277 U. S. 88 (1928). A third was whether it would be more convenient for the defendant or for the prosecution to adduce evidence of the presumed fact. See *Morrison* v. *California*, 291 U. S. 82 (1934); cf. *Rossi* v. *United States*, 289 U. S. 89 (1933); *Yee Hem* v. *United States*, *supra*.

[57] Section 2 (f) of the Federal Firearms Act, 52 Stat. 1251, 15 U. S. C. § 902 (f).

[58] *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35 (1910).

> ence is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U. S., at 467–468 (footnotes omitted).

The *Tot* Court reduced to the status of a "corollary" another test which had some support in prior decisions: [59] whether it was more convenient for the defendant or for the Government to supply proof of the ultimate fact which the presumption permitted to be inferred. The Court stated that "[t]he argument from convenience is admissible only where the inference is a permissible one . . . ." 319 U. S., at 469. The Court rejected entirely another suggested test with some backing in the case law,[60] according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn.[61] The *Tot* Court stated simply that "for whatever reason" Congress had not chosen to make the basic act a crime. *Id.*, at 472.

Applying the "rational connection" test, the Court held the *Tot* presumption unconstitutional. The Court rejected the contention that because most States forbade intrastate acquisition of firearms without a record of the transaction or registration of ownership it could be inferred merely from possession that an acquisition which did not meet these requirements must have been interstate, noting the alternative possibilities of unlawful

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[59] See n. 56, *supra*.

[60] See *ibid*.

[61] For example, it was argued in *Tot* that in order to regulate interstate commerce in firearms Congress might have prohibited possession of *all* firearms by persons who had been convicted of crimes of violence.

intrastate acquisition and interstate shipment prior to the beginning of state regulation. See *id.*, at 468.[62]

The two subsequent cases in which this Court ruled upon the constitutionality of criminal statutory presumptions, *United States* v. *Gainey*, 380 U. S. 63 (1965), and *United States* v. *Romano*, 382 U. S. 136 (1965), involved companion sections of the Internal Revenue Code dealing with illegal stills. The presumption in *Gainey* was worded similarly to the one at issue here; it permitted a jury to infer from a defendant's presence at an illegal still that he was "carrying on" the business of a distiller "unless the defendant explains such presence to the satisfaction of the jury . . . ." See 26 U. S. C. §§ 5601 (a)(4), 5601 (b)(2).

We held that the *Gainey* presumption should be tested by the "rational connection" standard announced in *Tot*. We added:

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." 380 U. S., at 67.

Applying these principles, we sustained the *Gainey* presumption, finding that it "did no more than 'accord to the evidence, if unexplained, its natural probative force.'" 380 U. S., at 71.

The presumption under attack in *United States* v. *Romano, supra,* was identical to that in *Gainey* except that it authorized the jury to infer from the defendant's presence at an illegal still that he had possession, custody, or control of the still. See 26 U. S. C. §§ 5601 (a)(1),

[62] The Court declared that there was even less reason to conclude from possession that the acquisition had occurred subsequent to the effective date of the Firearms Act.

5601 (b)(1). We held this presumption invalid. While stating that the result in *Gainey* was entirely justified because "[p]resence at an operating still is sufficient evidence to prove the charge of 'carrying on' because anyone present at the site is very probably connected with the illegal enterprise," 382 U. S., at 141, we concluded:

> "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary . . . .' *Tot* v. *United States*, 319 U. S. 463, 467." *Ibid.*[63]

The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[64] And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily.

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[63] Like the Court in *Tot*, we limited ourselves in *Romano* to consideration of the crime Congress actually had defined. We observed that Congress had not chosen to make presence at an illegal still a crime in itself, but had only "declar[ed] presence to be sufficient evidence to prove the crime of possession beyond reasonable doubt," and concluded that "[t]his approach obviously fails under the standards traditionally applied to such legislation." 382 U. S., at 144.

[64] Since we find that the § 176a presumption is unconstitutional under this standard, we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use. Cf. *United States* v. *Adams*, 293 F. Supp. 776, 783–784 (1968). See also *United States* v. *Romano*, *supra*, at 140–144; Comment, The Constitutionality of Statutory Criminal Presumptions, 34 U. Chi. L. Rev. 141 (1966).

C.

How does the § 176a presumption fare under these standards?

So far as here relevant, the presumption, quoted *supra*, at 30, authorizes the jury to infer from a defendant's possession of marihuana two necessary elements of the crime: (1) that the marihuana was imported or brought into the United States illegally; and (2) that the defendant knew of the unlawful importation or bringing in.[65] Petitioner argues that neither inference is valid, citing undisputed testimony at his trial to the effect that marihuana will grow anywhere in the United States, and that some actually is grown here.[66] The Government contends, on the other hand, that both inferences are permissible. For reasons that follow, we hold unconstitutional that part of the presumption which relates to a defendant's knowledge of illegal importation. Consequently, we do not reach the question of the validity of the "illegal importation" inference.

With regard to the "knowledge" presumption, we believe that *Tot* and *Romano* require that we take the statute at face value and ask whether it permits conviction upon insufficient proof of "knowledge," rather than inquire whether Congress might have made possession itself a crime.[67] In order thus to determine the con-

[65] The presumption also permits inference of a third element: that the importation or bringing in was with intent to defraud the United States. The permissibility of this inference was not one of the questions presented in Leary's petition for certiorari, and on the view we take of this branch of the case we have no occasion to consider it.

[66] See 1 Transcript of Record 165, 186–187. Petitioner attempted to introduce further evidence concerning the proportion of domestically consumed marihuana which in fact has been grown in the United States, but the District Court held it irrelevant and therefore inadmissible. See 2 Transcript of Record 517.

[67] See *supra*, at 34 and n. 63.

stitutionality of the "knowledge" inference, one must have direct or circumstantial data regarding the beliefs of marihuana users generally about the source of the drug they consume. Such information plainly is "not within specialized judicial competence or completely commonplace," *United States* v. *Gainey, supra,* at 67. Indeed, the presumption apparently was enacted to relieve the Government of the burden of having to adduce such evidence at every trial, and none was introduced by the prosecution at petitioner's trial. Since the determination of the presumption's constitutionality is "highly empirical," *ibid.*, it follows that we must canvass the available, pertinent data.

Of course, it must be kept in mind that "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Ibid.* However, it quickly becomes apparent that the legislative record does not supply an adequate basis upon which to judge the soundness of the "knowledge" part of the presumption. We have therefore taken other materials into account as well, in an effort to sustain the presumption. In so doing, we have not confined ourselves to data available at the time the presumption was enacted in 1956, but have also considered more recent information, in order both to obtain a broader general background and to ascertain whether the intervening years have witnessed significant changes which might bear upon the presumption's validity.[68]

As has been noted, we do not decide whether the presumption of illegal importation is itself constitutional.

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[68] A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. See *Block* v. *Hirsh,* 256 U. S. 135, 154–155 (1921); *Communist Party* v. *SACB,* 367 U. S. 1, 110–114 (1961).

However, in view of the paucity of direct evidence as to the beliefs of marihuana smokers generally about the source of their marihuana, we have found it desirable to survey data concerning the proportion of domestically consumed marihuana which is of foreign origin, since in the absence of better information the proportion of marihuana actually imported surely is relevant in deciding whether marihuana possessors "know" that their marihuana is imported.

D.

Since the importation question is a subsidiary one, we take it up first, beginning, of course, with the legislative history of § 176a. The House and Senate committee reports and the floor debates are relatively unhelpful.[69] More informative are the records of extensive hearings before House and Senate committees.[70] Near the outset of the Senate committee hearings, the then Commissioner of Narcotics, Harry J. Anslinger, estimated that 90% of all marihuana seized by federal authorities had been smuggled from Mexico, and that although "there is considerable volunteer growth from old plantings in the Middle West . . . , [t]here is very little of the local land used because it just does not have the advantage of the long summer growing, and [domestic marihuana] is not as potent as the Mexican drug." [71]

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[69] See S. Rep. No. 1997, 84th Cong., 2d Sess., 7, 13 (1956); H. R. Rep. No. 2388, 84th Cong., 2d Sess., 3, 6 (1956); H. R. Conf. Rep. No. 2546, 84th Cong., 2d Sess., 14 (1956); 102 Cong. Rec. 269, 271, 9015, 10688, 12166.

[70] Hearings on Traffic in, and Control of, Narcotics, Barbiturates, and Amphetamines before a Subcommittee of the House Committee on Ways and Means, 84th Cong. (1955–1956) (hereinafter cited as House Hearings); Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (hereinafter cited as Senate Hearings).

[71] Senate Hearings 18.

A number of officials responsible for enforcing the narcotics laws in various localities estimated that a similar proportion of the marihuana consumed in their areas was of Mexican origin.[72]

On the other hand, written material inserted in the record of the Senate hearings included former testimony of an experienced federal customs agent before another Senate committee, to the effect that high-quality marihuana was being grown near the Texas cities of Laredo and Brownsville.[73] A written report of the Ohio Attorney General recited that marihuana "may grow unnoticed along roadsides and vacant lots in many parts of the country," [74] and a Philadelphia Police Academy bulletin stated that: "Plenty of [marihuana] is found growing in this city." [75]

Examination of periodicals and books published since the enactment of the presumption leaves no doubt that in more than a dozen intervening years there have been great changes in the extent and nature of marihuana use in this country. With respect to quantity, one readily available statistic is indicative: the amount of marihuana seized in this country by federal authorities has jumped from about 3,400 pounds in 1956 to about 61,400 pounds in 1967.[76] With regard to nature of use, the 1955 hearing records and other reports portray marihuana smoking as at that time an activity almost exclu-

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[72] See House Hearings 618, 1071; Senate Hearings 2384, 2471–2472, 4370, 4630. See also House Hearings 889; Senate Hearings 2893, 3488–3490; 102 Cong. Rec. 269, 271.

[73] See Senate Hearings 3488–3489.

[74] *Id.*, at 4814.

[75] *Id.*, at 599. See also Senate Hearings 4167.

[76] Compare Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 67 (1956), with *id.*, at 43 (1967). These seizures are estimated to represent 10% of the marihuana actually smuggled into the United States. See Appendix 92a.

sively of unemployed or menially employed members of racial minorities.[77] Current periodicals and books, on the other hand, indicate that marihuana smoking has become common on many college campuses and among persons who have voluntarily "dropped out" of American society in protest against its values, and that marihuana smokers include a sizeable number of young professional persons.[78]

Despite these undoubted changes, the materials which we have examined point quite strongly to the conclusion that most domestically consumed marihuana is still of foreign origin. During the six years 1962–1967, some 79% of all marihuana seized by federal authorities was seized in attempted smuggling at ports and borders.[79] The Government informs us that a considerable part of the internally seized marihuana bore indications of foreign origin.[80] While it is possible that these facts reflect only the deployment of federal narcotics forces, rather than the actual proportion of imported to domestic marihuana, almost all of the authorities which we have con-

[77] See, *e. g.*, J. Rosevear, Pot: A Handbook of Marihuana 118 (1967); Bouquet, Cannabis, Parts III–V, 3 U. N. Bull. on Narcotics, No. 1, 22, 32–33 (1951); Mayor's Committee on Marihuana, The Marihuana Problem in the City of New York 17–25 (1944); Blum, Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 21, 24 (1967).

[78] See, *e. g.*, Rosevear, *supra*, at 117–131; Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 2, 40 (1966); Blum, *supra*, at 24; Cahn, The User and the Law, in J. Simmons (ed.), Marihuana: Myths and Realities (1967); McGlothlin, Toward a Rational View of Marihuana, in Simmons (ed.), *supra*, at 195–198.

[79] See Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 66 (1962); *id.*, at 78 (1963); *id.*, at 84 (1964); *id.*, at 51 (1965); *id.*, at 45 (1966); *id.*, at 43 (1967).

[80] See Brief for the United States 40.

sulted confirm that the preponderance of domestically consumed marihuana is grown in Mexico.[81]

Petitioner makes much of statistics showing the number of acres of domestic marihuana destroyed annually by state and federal authorities, pointing out that if harvested the destroyed acreage could in each year have accounted for all marihuana estimated to have been consumed in the United States,[82] and that no one knows how many acres escape destruction. However, several factors weaken this argument from domestic growth. First, the number of acres annually destroyed declined by a factor of three between 1959 and 1967,[83] while during the same period the consumption of marihuana, as measured by federal seizures, rose twenty-fold.[84]

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[81] See, *e. g.*, Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 36 (1963); *id.*, at 30 (1964); Mandel, Myths and Realities of Marihuana Pushing, in J. Simmons (ed.), Marihuana: Myths and Realities 58–110 (1967); President's Commission on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 213 (1967); Simmons (ed.), *supra*, at 233; United States Government, Report on the Working of the International Treaties on Narcotic Drugs 17 (1966); *id.*, at 24–25 (1967). Contra, see Transcript of Pretrial Hearing, July 15, 1968, *United States* v. *Adams*, 293 F. Supp. 776 (1968), at 67, 76 (testimony of Dr. Richard Schultes, Director of Harvard Botanic Museum) (hereafter 1 Transcript). See also J. Rosevear, Pot: A Handbook of Marihuana 35, 119–120 (1967).

[82] In 1967, 1,466 acres were destroyed. See United States Government, Report on the Working of the International Treaties on Narcotic Drugs 9 (1967). Accepting the Bureau of Narcotics' lowest estimate of yield per acre, see Brief for the United States 38, n. 43, this acreage would have supplied over 1,200,000 pounds of marihuana. This is enough for about 1,800,000,000 marihuana cigarettes. See *infra*, at 51 and n. 109.

[83] Compare Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 12 (1959), with United States Government, Report on the Working of the International Treaties on Narcotic Drugs 9 (1967). The decline was steady.

[84] Compare Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 43 (1959), with *id.*, at 43 (1967).

Assuming constant diligence on the part of those charged with destruction, this would indicate that in 1967 a much smaller share of the market was domestically supplied than in 1959. Second, while the total number of acres annually destroyed has indeed been large enough to furnish all domestically consumed marihuana,[85] the state-by-state breakdowns which are available for the years 1964–1967 reveal that in each of those years more than 95% of the destroyed acreage was in two midwestern states, Illinois and Minnesota.[86] The large, recurrent marihuana acreages discovered in those States can plausibly be ascribed to the "volunteer growth from old plantings in the Middle West" about which Commissioner Anslinger testified,[87] while illicit cultivators of marihuana would be likely to choose States with sparser populations and more favorable climates.[88] Third and last, reports of the Bureau of Narcotics and testimony of its agents indicate that in its far-reaching investigations the Bureau has never encountered a system for distributing sizeable quantities of domestically grown marihuana.[89] In contrast, the Bureau has found evidence of many large-scale distribution systems with sources in Mexico.[90]

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[85] See n. 82, *supra*.

[86] See Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 17 (1965); United States Government, Report on the Working of the International Treaties on Narcotic Drugs 10 (1966); *id.*, at 9 (1967).

[87] See *supra*, at 39.

[88] Most authorities believe that more potent marihuana can be grown in a hot, dry climate. See *infra*, at 49 and n. 102.

[89] See Bureau of Narcotics, Reports on the Traffic in Opium and Other Dangerous Drugs 1956–1967; Transcript of Pretrial Hearing, July 24, 1968, *United States* v. *Adams*, 293 F. Supp. 776 (1968), at 37–45 (hereafter 2 Transcript); United States Government, Report on the Working of the International Treaties on Narcotic Drugs 17 (1966); *id.*, at 24–25 (1967). But cf. Senate Hearings 3488–3490.

[90] See, *e. g.*, Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 23 (1965) (seizure of about 1,800

E.

The Government urges that once it is concluded that most domestically consumed marihuana comes from abroad—a conclusion which we think is warranted by the data just examined—we must uphold the "knowledge" part of the presumption in light of this Court's decision in *Yee Hem* v. *United States*, 268 U. S. 178 (1925). In that case, the Court sustained a presumption which was virtually identical to the one at issue here except that the forbidden substance was smoking opium rather than marihuana. With respect to the inference of knowledge from possession which was authorized by that presumption, the Court said:

> "Legitimate possession [of opium], unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress." 268 U. S., at 184.

The Government contends that *Yee Hem* requires us to read the § 176a presumption as intended to put every marihuana smoker on notice that he must be prepared to show that any marihuana in his possession was

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pounds of Mexican marihuana), 23–24 (seizure of about one ton of Mexican marihuana), 24 (seizure of about 3½ tons of Mexican marihuana); *id.* (1966), at 17 (seizure of about 600 pounds of Mexican marihuana). By contrast, the largest reported seizure of marihuana definitely grown in the United States involved only about eight pounds. See *id.*, at 7 (1967). But see also Senate Hearings 3488–3490.

not illegally imported, and that since the possessor is the person most likely to know the marihuana's origin it is not unfair to require him to adduce evidence on that point. However, we consider that this approach, which closely resembles the test of comparative convenience in the production of evidence,[91] was implicitly abandoned in *Tot* v. *United States*, 319 U. S. 463 (1943). As was noted previously, the *Tot* Court confronted a presumption which allowed a jury to infer from possession of a firearm that it was received in interstate commerce. Despite evidence that most States prohibited unregistered and unrecorded acquisition of firearms, the Court did not read the statute as notifying possessors that they must be prepared to show that they received their weapons in intrastate transactions, as *Yee Hem* would seem to dictate. Instead, while recognizing that "the defendants . . . knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce," 319 U. S., at 469, the Court held that because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant. This was a matter which the *Yee Hem* Court either thought it unnecessary to consider or assumed when it described the inference as "natural." [92]

F.

We therefore must consider in detail whether the available evidence supports the conclusion that the "knowl-

[91] See *supra*, at 34 and n. 56.

[92] In refusing to follow this aspect of the reasoning in *Yee Hem*, we intimate no opinion whatever about the continued validity of the presumption relating to "hard" narcotics, which was sustained in *Yee Hem* and is now found in 21 U. S. C. § 174. As will appear, our holding that the § 176a "knowledge" presumption is unconstitutional rests entirely upon a detailed inquiry into the available facts about the state of mind of marihuana users. The facts regarding "hard" narcotics may well be significantly different.

edge" part of the § 176a presumption is constitutional under the standard established in *Tot* and adhered to in *Gainey* and *Romano*—that is, whether it can be said with substantial assurance that one in possession of marihuana is more likely than not to know that his marihuana was illegally imported.

Even if we assume that the previously assembled data are sufficient to justify the inference of illegal importation, see *supra*, at 44, it by no means follows that a majority of marihuana possessors "know" [93] that their marihuana was illegally imported. Any such proposition would depend upon an intermediate premise: that most marihuana possessors are aware of the level of importation and have deduced that their own marihuana was grown abroad. This intermediate step might be thought justified by common sense if it were proved that little or no marihuana is grown in this country. Short of such a showing, not here present, we do not believe that the inference of knowledge can be sustained solely because of the assumed validity of the "importation" presumption.

Once it is established that a significant percentage of domestically consumed marihuana may not have been imported at all, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported. We conclude that in order to sustain the inference of knowledge we must

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[93] Nothing in the legislative history of § 176a is of aid in determining the intended scope of the word "knowing," as it is used in that section. In making that determination, we have employed as a general guide the definition of "knowledge" which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962). The Code provides:

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

find on the basis of the available materials that a majority of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marihuana was grown abroad.

We can imagine five ways in which a possessor might acquire such knowledge: (1) he might be aware of the proportion of domestically consumed marihuana which is smuggled from abroad and deduce that his was illegally imported; (2) he might have smuggled the marihuana himself; (3) he might have learned by indirect means that the marihuana consumed in his locality or furnished by his supplier was smuggled from abroad; (4) he might have specified foreign marihuana when making his "buy," or might have been told the source of the marihuana by his supplier; (5) he might be able to tell the source from the appearance, packaging, or taste of the marihuana itself.

We treat these five possibilities *seriatim*, in light of the available materials, beginning in each instance with the legislative record. We note at the outset that although we have been able to discover a good deal of relevant secondary evidence, we have found none of the best kind possible—testimony of marihuana users about their own beliefs as to origin, or studies based upon interviews in which users were asked about this matter. The committee hearings which preceded passage of § 176a included testimony by many marihuana smokers, but none was ever asked whether he knew the origin of the marihuana he smoked. It should also be kept in mind that the great preponderance of marihuana smokers are "occasional" rather than "regular" users of the drug,[94]

[94] See J. Rosevear, Pot: A Handbook of Marihuana 124–125 (1967). It has been estimated that there are 500,000 to 1,000,000 "regular" marihuana smokers in the United States and 3,000,000 to 5,000,000 "occasional" users. See J. Simmons (ed.), Marihuana: Myths and Realities 232 (1967).

and that "occasional" smokers appear to be arrested disproportionately often, due to their inexpertness in taking precautions.[95] "Occasional" users are likely to be less informed and less particular about the drug they smoke;[96] hence, it is less probable that they will have learned its source in any of the above ways.

The first possibility is that a possessor may have known the proportion of imported to domestic marihuana and have deduced that his own marihuana was grown abroad. The legislative record is of no assistance in evaluating this possibility. Such indirect evidence as we have found points to the conclusion that while most marihuana users probably know that some marihuana comes from Mexico, it is also likely that the great majority either have no knowledge about the proportion which is imported or believe that the proportion is considerably lower than may actually be the case.[97]

The second possibility is that a possessor may know the origin of his marihuana because he smuggled it into the United States himself. The legislative record is unhelpful in estimating the proportion of possessors who fall into this class. Other sources indicate that there are a considerable number of smokers who "smuggle their own," but that the great majority of possessors have obtained their marihuana from suppliers in this country.[98]

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[95] See *id.*, at 236; Rosevear, *supra*, at 121–125.

[96] See *ibid.*

[97] See *United States* v. *Adams*, 293 F. Supp. 776, 780–781, 784–785 (1968).

[98] See Becker, Marihuana: A Sociological Overview, in D. Solomon (ed.), The Marihuana Papers 33, 47–50 (1966); Mandel, Myths and Realities of Marihuana Pushing, in Simmons (ed.), *supra*, at 58–110; Rosevear, *supra*, at 27–37, 117–131; Simmons (ed.), *supra*, at 231–234. It should be remembered that there are estimated to be at least 3,500,000 "regular" or "occasional" marihuana smokers in the United States. See n. 94, *supra*.

The legislative record is also uninformative about the possibility that a possessor may have learned the source of his marihuana by indirect means. Other sources reveal that imported marihuana usually passes through a number of hands before reaching the consumer, and that the distribution system is kept secret.[99] It would appear that relatively few consumers know the origin of their marihuana by indirect means.

The fourth possibility is that the possessor may have specified foreign marihuana when making his purchase or may have been told by his supplier that the marihuana was grown abroad. The legislative record is somewhat more helpful with respect to this possibility, for it does contain statements to the effect that Mexican marihuana is more potent than domestic and is consequently preferred by smokers.[100] However, the legislative record also contains testimony by a customs agent that Texas marihuana is as "good" as that from Mexico.[101] Most authorities state that Mexican marihuana generally does have greater intoxicating power than domestic marihuana, due to the higher temperatures and lower humidity usually encountered in Mexico.[102] There are some indications that smokers are likely to prefer Mexican marihuana,[103] but there is nothing to show that purchasers

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[99] See authorities cited in n. 98, *supra*.

[100] See *supra*, at 39 (testimony of Commissioner Anslinger); House Hearings 1071–1072, Senate Hearings 4354–4355 (statements of District Supervisor Aman).

[101] See Senate Hearings 3488–3489. See also House Hearings 288.

[102] See authorities referred to in A. Hodapp, Marihuana: A Review of the Literature for Analytical Chemists 13 (1959); Bouquet, Cannabis, Parts I–II, 2 U. N. Bull. on Narcotics, No. 4, 14, 21–22 (1950); Ciba Foundation Study Group No. 21, Hashish: Its Chemistry and Pharmacology 33 (1965); Simmons (ed.), *supra*, at 230.

[103] See authorities cited in n. 100, *supra*; Rosevear, *supra*, at 32–33, 68; Boughey, Pot Scenes East and West, in Simmons (ed.),

commonly specify Mexican marihuana when making a "buy." It appears that suppliers of marihuana occasionally volunteer the place of origin,[104] but we have found no hint that this is usually done, and there are indications that if the information is not volunteered the buyer may be reluctant to ask, for fear of being thought an informer.[105] We simply are unable to estimate with any accuracy, on the basis of these data, what proportion of marihuana possessors have learned the origin of their marihuana in this way. It is certainly not a majority; but whether it is a small minority or a large one we are unable to tell.

The fifth possibility is that a smoker may be able to tell the source of his marihuana from its appearance, packaging, or taste. As for appearance, it seems that there is only one species of marihuana, and that even experts are unable to tell by eye where a particular sample was grown.[106] The Court of Appeals for the Ninth Circuit did find in *Caudillo* v. *United States*, 253 F. 2d 513 (1958), on the basis of trial testimony, that "unmanicured" or "rough" marihuana—that is, marihuana containing some seeds and stems, as well as leaves—was much more likely to come from Mexico than from California; this was because the presence of seeds implied that the plant had been allowed to mature and evidence showed that California growers almost always harvested the plant before that stage. However, we have found nothing to indicate that this distinction holds good in other areas of the country, or that marihuana possessors are likely to realize its significance.

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supra, at 33–34; Mayor's Committee on Marihuana, The Marihuana Problem in the City of New York 9 (1944); Simmons (ed.), *supra*, at 233.

[104] See Rosevear, *supra*, at 32–33.

[105] See *id.*, at 33.

[106] See 1 Transcript 16–18, 541 (testimony of Dr. Richard Schultes, Director of Harvard Botanic Museum).

With respect to packaging, there is evidence that Mexican marihuana is commonly compressed into distinctive "bricks" and then wrapped in characteristically Mexican paper.[107] Yet even if it is assumed that most Mexican marihuana bears such distinguishing marks when first brought into this country, there is no indication that they normally are still present when it reaches the consumer. The packaging method just mentioned apparently is intended to facilitate transportation of relatively large quantities of marihuana. A "brick" appears usually to contain about one kilogram of marihuana,[108] and relatively few consumer sales will involve such a large amount, since a kilogram of marihuana will furnish some 3,300 marihuana cigarettes.[109] Smokers appear usually to purchase marihuana by the "bag"—about one-fifth ounce; by the "can"—about one ounce; or by the pound.[110] Hence, after importation "[t]he wholesalers will repackage the marihuana into smaller packages, . . . and they will do it in various ways." [111] We infer that only a small percentage of smokers are likely to learn of the drug's origin from its packaging.

With respect to taste, the Senate hearing record contains the statement of a federal customs agent that: "A good marihuana smoker can probably tell good marihuana

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[107] See 2 *id.*, at 19–33 (testimony of Narcotics Agent William Durkin). See also Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 17 (1966). But cf. Senate Hearings 3488–3489.

[108] See Simmons (ed.), *supra*, at 237; Rosevear, *supra*, at 159; Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 17 (1966). See also Senate Hearings 3489.

[109] See Rosevear, *supra*, at 29; Mandel, Myths and Realities of Marihuana Pushing, in Simmons (ed.), *supra*, at 78; Senate Hearings 3489.

[110] See Rosevear, *supra*, at 28. See also Mandel, *supra*, at 78.

[111] 2 Transcript 26 (testimony of Narcotics Agent William Durkin).

from bad." [112] As has been seen, there is a preponderance of opinion to the effect that Mexican marihuana is more potent than domestic.[113] One authority states that purchasers of marihuana commonly sample the product before making a "buy." [114] However, the agent quoted above also asserted that some "good" marihuana was grown in Texas. And the account of the sampling custom further states that tasting is merely a ritual since "[u]sually the intoxication will not differ much from one cigarette to another . . . ." [115] Once again, we simply are unable to estimate what proportion of marihuana possessors are capable of "placing" the marihuana in their possession by its taste, much less what proportion actually have done so by the time they are arrested.

G.

We conclude that the "knowledge" aspect of the § 176a presumption cannot be upheld without making serious incursions into the teachings of *Tot*, *Gainey*, and *Romano*. In the context of this part of the statute, those teachings require that it be determined with substantial assurance that at least a majority of marihuana possessors have learned of the foreign origin of their marihuana through one or more of the ways discussed above.

We find it impossible to make such a determination. As we have seen, the materials at our disposal leave us at large to estimate even roughly the proportion of marihuana possessors who have learned in one way or another the origin of their marihuana. It must also be recognized that a not inconsiderable proportion of domestically consumed marihuana appears to have been grown

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[112] Senate Hearings 3489 (prior testimony of Customs Agent Lawrence Fleishman).

[113] See *supra*, at 49 and n. 102.

[114] See Rosevear, *supra*, at 31–33.

[115] *Id.*, at 32.

in this country, and that its possessors must be taken to have "known," if anything, that their marihuana was *not* illegally imported. In short, it would be no more than speculation were we to say that even as much as a majority of possessors "knew" the source of their marihuana.[116]

Nor are these deficiencies in the foundation for the "knowledge" presumption overcome by paying, as we do, the utmost deference to the congressional determination that this presumption was warranted. For Congress, no less than we, is subject to constitutional requirements, and in this instance the legislative record falls even shorter of furnishing an adequate foundation for the "knowledge" presumption than do the more extensive materials we have examined.

We thus cannot escape the duty of setting aside petitioner's conviction under Count 2 of this indictment.

For the reasons stated in Part I of this opinion we reverse outright the judgment of conviction on Count 3 of the indictment. For the reasons stated in Part II, we reverse the judgment of conviction on Count 2 and

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[116] A careful examination of the lower-court decisions regarding the presumption's constitutionality does not suggest the contrary. All courts of appeals which have ruled on the question have sustained the presumption. See *Caudillo* v. *United States*, 253 F. 2d 513 (C. A. 9th Cir. 1958); *Costello* v. *United States*, 324 F. 2d 260, 263–264 (C. A. 9th Cir. 1963); *United States* v. *Soto*, 256 F. 2d 729, 735 (C. A. 7th Cir. 1958); *Borne* v. *United States*, 332 F. 2d 565, 566 (C. A. 5th Cir. 1964); *United States* v. *Gibson*, 310 F. 2d 79, 82 (C. A. 2d Cir. 1962). However, there is no indication that in any of these cases the court had before it or took into account even a fraction of the evidence which we have considered; in one instance, the lack of evidence was expressly stated to be the ground of decision. See *United States* v. *Gibson, supra*. See also *Costello* v. *United States, supra*. The only lower court which conducted a factual inquiry in any way comparable to our own also held the presumption unconstitutional. See *United States* v. *Adams*, 293 F. Supp. 776 (D. C. S. D. N. Y. 1968).

remand the case to the Court of Appeals for further proceedings consistent with this opinion. We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with the marihuana traffic by other means.

Reversed and remanded.

MR. CHIEF JUSTICE WARREN joins Part II of the opinion of the Court and, considering himself bound by the decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968), concurs in the result as to Part I.

MR. JUSTICE STEWART, concurring.

I join Part II of the Court's opinion. As to Part I, I have before now expressed my conviction that the Fifth Amendment guarantee against compulsory self-incrimination was originally intended to do no more than confer a testimonial privilege in a judicial proceeding.[1] But the Court through the years has drifted far from that mooring; the *Marchetti* and *Grosso* cases [2] are simply the most recent in a long line of decisions marking the extent of the drift. Perhaps some day the Court will consider a fundamental re-examination of its decisions in this area, in the light of the original constitutional meaning. Until that day comes, it seems to me that the authoritative weight of precedent permits no escape from the conclusion reached by the Court in this case. I therefore join its opinion and judgment.

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[1] See *Grosso* v. *United States*, 390 U. S. 62, 76 (concurring opinion); *In re Gault*, 387 U. S. 1, 80, n. 3 (dissenting opinion).

[2] *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 62.

MR. JUSTICE BLACK, concurring in the result.

I concur in the Court's outright reversal of the petitioner's conviction on Count 3 of the indictment for the reasons set out in Part I of the Court's opinion.

I also concur in reversal of the petitioner's conviction on Count 2 of the indictment, based on 21 U. S. C. § 176a. That section makes it a crime to import marihuana into the United States or to receive, conceal, or transport it, knowing it to have been imported contrary to law, and then goes on to provide that the mere possession of marihuana shall be "deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." The trial court in this case charged the jury that proof that petitioner merely had possession of marihuana was sufficient to authorize a finding that he knew it had been imported or brought into the United States contrary to law. It is clear beyond doubt that the fact of possession alone is not enough to support an inference that the possessor knew it had been imported. Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn. See *Thompson* v. *Louisville,* 362 U. S. 199 (1960). Under our system of separation of powers, Congress is just as incompetent to instruct the judge and jury in an American court what evidence is enough for conviction as the courts are to tell the Congress what policies it must adopt in writing criminal laws. The congressional presumption, therefore, violates the constitutional right of a defendant to be tried by jury in a court set up in accordance with the commands of the Constitution. It clearly deprives a defendant of his right not to be convicted and punished for a crime with-

out due process of law, that is, in a federal case, a trial before an independent judge, after an indictment by grand jury, with representation by counsel, an opportunity to summon witnesses in his behalf, and an opportunity to confront the witnesses against him. This right to a full-fledged trial in a court of law is guaranteed to every defendant by Article III of the Constitution, by the Sixth Amendment, and by the Fifth and Fourteenth Amendments' promises that no person shall be deprived of his life, liberty, or property without due process of law—that is, a trial according to the law of the land, both constitutional and statutory.

It is for these reasons, and not because I think the law is "'irrational' or 'arbitrary,' and hence unconstitutional," *ante*, at 36, that I would invalidate this presumption. I am firmly and profoundly opposed to construing "due process" as authorizing this Court to invalidate statutes on any such nebulous grounds. My quite different reasons for holding that the presumption does deny due process of law, that is the benefit of the "law of the land," have been fully set out in many opinions, including, for illustration, my concurring opinion in *Tot* v. *United States*, 319 U. S. 463, 473 (1943), and my dissenting opinion in *United States* v. *Gainey*, 380 U. S. 63, 74 (1965).

UNITED STATES *v.* COVINGTON.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 366. Argued December 12, 1968.—Decided May 19, 1969.

In this companion case to *Leary* v. *United States, ante,* p. 6, appellee was charged in a one-count indictment in the Southern District of Ohio with having violated a provision of the Marihuana Tax Act by having obtained a quantity of marihuana without having paid the transfer tax imposed by the Act. Appellee, asserting that his possession of marihuana was illegal under Ohio law and that he would have substantially risked incrimination had he complied with the Act, moved to dismiss the indictment under the authority of *Marchetti* v. *United States,* 390 U. S. 39, *Grosso* v. *United States,* 390 U. S. 62, and *Haynes* v. *United States,* 390 U. S. 85. The District Court upheld the motion to dismiss on the ground that the Fifth Amendment privilege against self-incrimination provided a complete defense to prosecution and alternatively that if (as the Government contended) appellee was not required to pay the tax, there could be no basis for the indictment. *Held:*

1. The decision was one which might be appealed directly to this Court under 18 U. S. C. § 3731: if the dismissal of the indictment rested on the ground that the Fifth Amendment privilege would be a defense, then the decision was one "sustaining a plea in bar"; if the dismissal was based on acceptance of the Government's interpretation of the Marihuana Tax Act, then the decision necessarily was "based upon [a] construction of the statute upon which the indictment was founded." P. 59.

2. The Marihuana Tax Act requires persons like appellee to prepay the transfer tax. *Leary* v. *United States, supra.* P. 59.

3. The Fifth Amendment privilege provides a complete defense to prosecution under that Act if the defendant's plea of self-incrimination is timely, the defendant confronts a substantial risk of self-incrimination by complying with the Act's terms, and he has not waived his privilege. *Ibid.* Pp. 59–61.

282 F. Supp. 886, affirmed.

Philip A. Lacovara argued the cause for the United States, *pro hac vice.* With him on the brief were

Solicitor General Griswold, Assistant Attorney General Vinson, and *Beatrice Rosenberg.*

William J. Davis, by appointment of the Court, 393 U. S. 973, and *Robert J. Haft* argued the cause for appellee. *Mr. Davis* also filed a brief for appellee.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a companion case to *Leary* v. *United States,* decided today, *ante,* p. 6. Appellee was charged in a one-count federal indictment in the Southern District of Ohio with having violated 26 U. S. C. § 4744 (a)(1), a part of the Marihuana Tax Act, by obtaining 737.1 grams of marihuana without having paid the transfer tax imposed by 26 U. S. C. § 4741 (a).[1] On appellee's motion, the District Court dismissed the indictment, holding that under principles established in *Marchetti* v. *United States,* 390 U. S. 39 (1968), *Grosso* v. *United States,* 390 U. S. 62 (1968), and *Haynes* v. *United States,* 390 U. S. 85 (1968), appellee's privilege against self-incrimination necessarily would provide a complete defense to the prosecution. 282 F. Supp. 886 (1968).

On motion for reconsideration, the Government advanced the argument, more fully described in *Leary, supra,* at 18–20, that the transfer tax provisions of the Marihuana Tax Act do not compel incriminatory disclosures because, as administratively construed and applied, they allow prepayment of the tax only by persons whose activities are otherwise lawful. The District Court responded by ruling in the alternative that if appellee was not required to pay the tax there could be no basis for the indictment. Appendix 20.

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[1] The relevant provisions of the Marihuana Tax Act are set out and their relationships explained in *Leary* v. *United States, supra,* at 14–15.

The Government appealed directly to this Court pursuant to 18 U. S. C. § 3731, which authorizes direct appeal from the dismissal of an indictment when the decision is one "sustaining a motion in bar" or "is based upon the invalidity or construction of the statute upon which the indictment or information is founded." We noted probable jurisdiction, 393 U. S. 910 (1968),[2] and the appeal was argued together with *Leary* v. *United States, supra.*

As has been noted, the District Court dismissed the indictment on two alternative grounds. We begin with the second, which was that, assuming the Government's construction of the Marihuana Tax Act to be correct, the indictment did not charge an offense under that statute. Our decision today in *Leary, supra,* makes it plain that this was an improper ground of dismissal, for we have held that the Government's interpretation is incorrect and that the Act requires persons like appellee to prepay the transfer tax. See *ante,* at 20–26.

The District Court's other basis for dismissal was that appellee's Fifth Amendment privilege necessarily would provide a complete defense to the prosecution. We have held today in *Leary* that the privilege does provide such a defense unless the plea is untimely, the defendant confronted no substantial risk of self-incrimination, or the privilege has been waived. See *ante,* at 27.[3] See also

[2] If the dismissal rested on the ground that the Fifth Amendment privilege would be a defense, then the decision was one "sustaining a motion in bar." See *United States* v. *Murdock,* 284 U. S. 141 (1931). If the dismissal was based on a finding that under the Government's construction of the Marihuana Tax Act the indictment stated no offense, then the decision necessarily was "based upon the . . . construction of the statute upon which the indictment . . . [was] founded." See *United States* v. *Borden Co.,* 308 U. S. 188, 193 (1939).

[3] Leary was convicted under 26 U. S. C. § 4744 (a) (2), prohibiting transportation or concealment of marihuana by one who acquired it

Marchetti v. *United States,* 390 U. S. 39, 61 (1968). The questions remain whether such a plea of the privilege may ever justify dismissal of an indictment, and if so whether this is such an instance.

Federal Rule of Criminal Procedure 12 (b)(1) states that: "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." A defense is thus "capable of determination" if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.[4] Rule 12 (b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.

In many instances, a defense of self-incrimination to a Marihuana Tax Act prosecution will be "capable of determination without the trial of the general issue." A plea on motion to dismiss the indictment is plainly timely. The question whether the defendant faced a substantial risk of incrimination is usually one of law which may be resolved without reference to the circumstances of the alleged offense. There may more frequently be instances when the issue of waiver will be suitable for trial together with the "general issue."[5] However, the question whether the privilege has been waived also is one of law, and in most cases there will be no factual dispute about it. Hence, we think that a defendant's assertion of the privilege should be sufficient to create a legal pre-

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without having paid the transfer tax, while appellee was indicted under 26 U. S. C. § 4744 (a)(1), forbidding such acquisition. We think it clear that there is no significant distinction between the statutes for purposes of the Fifth Amendment privilege.

[4] See 8 J. Moore, Federal Practice ¶ 12.04 (R. Cripes ed. 1968); 2 L. Orfield, Criminal Procedure Under the Federal Rules §§ 12.51–12.60 (1966).

[5] Cf. *Leary* v. *United States, supra,* at 28–29.

sumption of nonwaiver, and thus to require dismissal of the indictment, unless the Government can rebut the presumption by showing a need for further factual inquiries.

Application of these principles to this appeal requires affirmance. Appellee asserted in his motion to dismiss that his possession of marihuana was illegal under Ohio law, and that he would have run a substantial risk of incrimination had he complied with the Act. The District Court reached the same conclusion. The Government appears to acknowledge the illegality of appellee's possession.[6] We conclude that there is no possibility of any factual dispute with regard to the hazard of incrimination.

There is in this brief record no indication that appellee waived his privilege, and the Government has never alleged the existence of a factual controversy on that score. Hence, we think it "just under the circumstances" that the case be finally disposed of at this level. See 28 U. S. C. § 2106; *Grosso* v. *United States*, 390 U. S. 62, 71–72 (1968); *Haynes* v. *United States*, 390 U. S. 85, 100–101 (1968). Accordingly, the judgment of the District Court is

Affirmed.

MR. CHIEF JUSTICE WARREN, considering himself bound by the decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968), concurs in the judgment of the Court.

MR. JUSTICE STEWART joins the opinion and judgment of the Court upon the premise stated in his concurring opinion in *Leary* v. *United States*, *ante*, p. 54.

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[6] See Brief for the United States 3, n. 1.

IMMIGRATION AND NATURALIZATION SERVICE *v.* STANISIC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 297. Argued February 25, 1969.—Decided May 19, 1969.

Respondent, a Yugoslav crewman, while in the United States under a "D–1" conditional landing permit (granting an alien crewman temporary shore leave while his ship is in port), appeared on January 6, 1965, at the Portland, Oregon, office of the Immigration and Naturalization Service (INS) and claimed that he feared persecution upon return to Yugoslavia. On the basis of his statement that he would not return to his ship, and in accordance with § 252 (b) of the Immigration and Nationality Act (which provides a procedure for the deportation of an alien crewman holding a D–1 landing permit where it is determined that he does not intend to depart on the vessel which brought him) the District Director revoked respondent's permit. Respondent, however, was offered the opportunity the next day to present evidence supporting the persecution claim, pursuant to 8 CFR § 253.1 (e), under which an alien crewman whose conditional landing permit had been revoked and who claimed that he could not return to a Communist country because of fear of persecution might be temporarily "paroled" into the United States in the discretion of the District Director. Respondent presented no evidence, contending that he did not have enough time to prepare for the hearing and that he was entitled to have his claim for asylum heard by a special inquiry officer under § 242 (b) of the Act. The District Director ruled against respondent and ordered him returned to his ship, then still in port. Following a temporary stay of deportation by the District Court, the District Director on that court's order held a hearing at which respondent presented evidence, and on January 25, 1965, held that respondent had not shown that he would be "physically persecuted" in Yugoslavia. The District Court upheld that finding and rejected respondent's claim to a § 242 (b) hearing. Respondent took no appeal but petitioned Congress for a private bill, pending action on which the INS stayed deportation. When respondent's effort failed, the INS ordered him deported. The INS and later the District

Court on the basis of their previous determinations rejected respondent's renewed claim for a § 242 (b) hearing. The Court of Appeals reversed, holding that the matter was not *res judicata* because those determinations were based on the premise that respondent's ship was still in port; now, however, the ship had departed and respondent had still not been deported. The court concluded that § 252 (b) only authorized respondent's "summary deportation aboard the vessel on which he arrived or, within a very limited time after that vessel's departure, aboard another vessel pursuant to arrangements made before [his] vessel departed," and held that respondent was entitled to a *de novo* hearing under § 242 (b). *Held:*

1. The applicable procedure governing a request for asylum made by a crewman against whom § 252 (b) proceedings have been instituted was the one set forth in 8 CFR § 253.1 (e), which was promulgated under the Attorney General's statutory power to act upon an alien's request for asylum. Pp. 69–72.

2. An alien crewman whose temporary landing permit is properly revoked pursuant to § 252 (b) is not entitled to a § 242 (b) hearing merely because his deportation is not finally arranged or effected when his vessel leaves, and under such circumstances the Attorney General may provide (as he did in 8 CFR § 253.1 (e)) that the crewman's asylum request be heard by a district director. Pp. 72–79.

3. Since the Attorney General is authorized by an amendment to § 243 (h) made after respondent's January 1965 hearing before the District Director to withhold deportation of an alien found to be subject to "persecution on account of race, religion, or political opinion," and not just "physical persecution," the case is remanded for a new hearing before the District Director. P. 79.

393 F. 2d 539, reversed and remanded.

Joseph J. Connolly argued the cause for petitioner, *pro hac vice*. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson*, and *Philip R. Monahan*.

G. Bernard Fedde, by appointment of the Court, 393 U. S. 1010, argued the cause for respondent. With him on the brief was *Dorothy McCullough Lee*.

Edward J. Ennis and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case involves the type of hearing to which an alien crewman is entitled on his claim that he would suffer persecution upon deportation to his native land. The Court of Appeals sustained the respondent crewman's contention that he must be heard by a special inquiry officer [1] in a proceeding conducted under § 242 (b) of the Immigration and Nationality Act.[2] Petitioner, the

[1] A special inquiry officer is "any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings . . . ." Immigration and Nationality Act, § 101 (b)(4), 66 Stat. 171, 8 U. S. C. § 1101 (b)(4). The special inquiry officer has no enforcement duties. He performs "no functions other than the hearing and decision of issues in exclusion and deportation cases, and occasionally in other adjudicative proceedings." 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.7b, at 5–49 (1967); see generally *id.*, § 5.7.

[2] 66 Stat. 209, 8 U. S. C. § 1252 (b):

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

"(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

"(2) the alien shall have the privilege of being represented (at no

Immigration and Naturalization Service, argues that respondent's claim was properly heard and determined by a district director.[3] We brought the case here, 393 U. S. 912 (1968), to resolve the conflict on this score between the decision below and that of the Court of Appeals for the Second Circuit in *Kordic* v. *Esperdy*, 386 F. 2d 232 (1967).

I.

Respondent, a national of Yugoslavia, was a crewman aboard the Yugoslav vessel, M/V *Sumadija*, when it docked at Coos Bay, Oregon, in late December 1964. He requested and was issued a "D–1" conditional landing permit, in accordance with 8 CFR § 252.1 (d)(1) and § 252 (a)(1) of the Immigration and Nationality Act.[4] Under these provisions, the Service may allow a nonimmigrant alien crewman temporary shore leave for

> "the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is

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expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

"(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

[3] A district director is the officer in charge of a district office of the Immigration and Naturalization Service. He performs a wide range of functions. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.9c (1967); 8 CFR § 103.1 (f).

[4] Section 252 (a), 66 Stat. 220, 8 U. S. C. § 1282 (a) provides:

"No alien crewman shall be permitted to land temporarily in the United States except as provided in this section . . . . If an immigration officer finds upon examination that an alien crewman is a

satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived." *Ibid.*

On January 6, 1965, while on shore leave, respondent appeared at the Portland, Oregon, office of the Immigration and Naturalization Service. He claimed that he feared persecution upon return to Yugoslavia, and he flatly stated that he would not return to the M/V *Sumadija*. On the basis of the latter statement, and in accordance with § 252 (b) of the Act, the District Director revoked respondent's landing permit. Section 252 (b) provides:

> "[A]ny immigration officer may, in his discretion, if he determines that an alien . . . does not intend to depart on the vessel or aircraft which brought him, revoke the conditional permit to land which was granted such crewman under the provisions of subsection (a)(1), take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such

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nonimmigrant . . . and is otherwise admissible and has agreed to accept such permit, he may, in his discretion, grant the crewman a conditional permit to land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in subsection (b), and for a period of time, in any event, not to exceed—

"(1) the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived; or

"(2) twenty-nine days, if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived."

"D–1" and "D–2" landing permits are permits issued pursuant to 8 CFR §§ 252.1 (d)(1) and 252.1 (d)(2), which implement §§ 252 (a)(1) and 252 (a)(2) of the Act.

> vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States. . . . Nothing in this section shall be construed to require the procedure prescribed in section 242 of this Act to [*sic*] cases falling within the provisions of this subsection."

Section 252 (b) makes no express exception for an alien whose deportation would subject him to persecution. However, § 243 (h) permits the Attorney General to withhold the deportation of any alien to a country in which he would be subject to persecution, and analogously, 8 CFR § 253.1 (e) then provided: [5]

> "Any alien crewman . . . whose conditional landing permit issued under § 252.1 (d)(1) of this chapter is revoked who alleges that he cannot return to a Communist, Communist-dominated, or Communist-occupied country because of fear of persecution in that country on account of race, religion, or political opinion may be paroled into the United States . . . for the period of time and under the conditions set by the district director having jurisdiction over the area where the alien crewman is located."

Thus, although respondent was admittedly deportable under the terms of § 252 (b), he was not immediately returned to his vessel. On January 7, he was offered the opportunity to present evidence to the District Director in support of his claim of persecution.

Respondent presented no evidence to the District Director. Rather, he contended that he had not been given sufficient time to prepare for the hearing, and he also argued that he was entitled to have his claim heard

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[5] 26 Fed. Reg. 11797 (December 8, 1961). Effective March 22, 1967, the section was amended and redesignated § 253.1 (f), 32 Fed. Reg. 4341–4342.

by a special inquiry officer in accordance with the general provisions of § 242 (b). The District Director ruled against respondent and, in the absence of any evidence of probable persecution, ordered him returned to the M/V *Sumadija*, which was then still in port.

Respondent immediately sought relief in the United States District Court for the District of Oregon,[6] which, without opinion, temporarily stayed his deportation and referred the matter back to the District Director for a hearing on the merits of respondent's claim. On January 25, 1965, after a hearing at which respondent was represented by counsel and presented evidence, the District Director held that respondent "has [not] shown that he would be physically persecuted if he were to return to Yugoslavia." Appendix 22.

On respondent's supplemental pleadings, the District Court held that the District Director's findings were supported by the record. The court rejected respondent's claim that he was entitled to a § 242 (b) hearing before a special inquiry officer, relying on the last sentence of § 252 (b), which provides: "Nothing in this section shall be construed to require the procedure prescribed in section 242 of this Act to cases falling within the provisions of this subsection." *Vucinic [and Stanisic] v. Immigration Service*, 243 F. Supp. 113 (1965).

Respondent did not appeal the District Court's decision. Instead, in July 1965, he petitioned Congress for a private bill, pending action on which the Service stayed his deportation. Respondent's effort proved unsuccessful, and on June 21, 1966, the Service ordered him to appear for deportation to Yugoslavia.

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[6] Because the District Director's determination was not pursuant to § 242 (b), the District Court had jurisdiction to review his action. See *Cheng Fan Kwok* v. *Immigration Service*, 392 U. S. 206 (1968); *Stanisic* v. *Immigration Service*, 393 F. 2d 539, 542 (1968); *Vucinic [and Stanisic]* v. *Immigration Service*, 243 F. Supp. 113, 115–117 (1965); 5 U. S. C. § 1009.

The following day, respondent reasserted his claim of persecution before the Service, and requested that the matter be heard by a special inquiry officer pursuant to § 242. The Service, and subsequently the District Court, denied relief, both holding that this issue had previously been determined adversely to respondent.

The Court of Appeals for the Ninth Circuit reversed, *Stanisic* v. *Immigration Service*, 393 F. 2d 539 (1968), holding that the matter was not *res judicata* because of a significant change of circumstances: the District Director's adverse determination in 1965, and the District Court's unappealed approval thereof, were based on the unstated premise that the M/V *Sumadija* was still in port;[7] but now the ship had long since sailed, and respondent still had not been deported. The court held that § 252 (b) only authorized respondent's "summary deportation aboard the vessel on which he arrived or, within a very limited time after that vessel's departure, aboard another vessel pursuant to arrangements made before . . . [his] vessel departed." 393 F. 2d, at 542–543. Since neither of these conditions was met, respondent could no longer be deported pursuant to the District Director's 1965 determination; he was entitled to a *de novo* hearing before a special inquiry officer under § 242 (b) of the Act.

II.

At the outset, it is important to recognize the distinction between a determination whether an alien is statutorily deportable—something never contested by

[7] Actually, the ship sailed from the United States on or about January 16, 1965, or between the date on which the District Director revoked respondent's landing permit (January 6, 1965), and the date on which, after a hearing, he denied respondent's persecution claim (January 25, 1965). This fact was not in the record before the Court of Appeals.

respondent—and a determination whether to grant political asylum to an otherwise properly deportable alien.

Section 242 (b) provides a generally applicable procedure "for determining the deportability of an alien . . . ." Section 252 (b) provides a specific procedure for the deportation of alien crewmen holding D–1 landing permits. Neither of these sections is concerned with the granting of asylum.

Relief from persecution, on the other hand, is governed by §§ 212 (d)(5) and 243 (h). The former section authorizes the Attorney General, in his discretion, to

> "parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States . . . ."

The latter authorizes the Attorney General

> "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

No *statute* prescribes by what delegate of the Attorney General, or pursuant to what procedure, relief shall be granted under these provisions. By *regulation*, the decision to grant parole pursuant to § 212 (d)(5) rests with a district director, 8 CFR §§ 212.5 (a), 253.2; and by regulation, the decision to withhold deportation of *most* aliens pursuant to § 243 (h) is presently made by a special inquiry officer.[8] 8 CFR §§ 242.8 (a), 242.17 (c).

[8] This was not always so. Until 1962, the final determination was made by a regional commissioner of the Service. 8 CFR § 243.3 (b)(2) (1958 rev.); see *Foti* v. *Immigration Service*, 375 U. S. 217, 230, n. 16 (1963).

Prior to 1960, no regulation provided relief to an alien crewman whose D–1 landing permit was revoked but who claimed that return to his country would subject him to persecution. In *Szlajmer* v. *Esperdy*, 188 F. Supp. 491 (1960), a district court held that a crewman in this situation was entitled to be heard. The Service responded by promulgating 8 CFR § 253.1 (e), *supra*, at 67, the regulation which it applied in the case at bar. 8 CFR § 253.1 (e) is a hybrid. The grounds for relief are, for present purposes, identical to those of § 243 (h) of the Act.[9] However, because the Service adheres to the view that a crewman whose D–1 permit has been revoked is not "within the United States" in the technical sense of that phrase, see *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958), it terms the relief "parole" into the United States rather than "withholding deportation." Whatever terminological and conceptual differences may exist, the substance of the relief is the same.[10]

The Service could provide that *all* persecution claims be heard by a district director, and we see no reason why the Service cannot validly provide that the persecution claim of an alien crewman whose D–1 landing permit has been revoked be heard by a district director, whether or not the ship has departed. It might be argued, however, that the Service has not done so; that 8 CFR § 253.1 (e) was designed to govern the determination of persecution claims only when § 252 (b) of the Act governed determinations of deportability; and that if de-

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[9] The only substantial difference is that the regulation, but not the statute, is limited to Communist-inspired persecution.

[10] For this reason, we have no occasion to decide whether or not respondent was "within the United States." Compare *Szlajmer* v. *Esperdy*, 188 F. Supp. 491 (1960), with *Kordic* v. *Esperdy*, 386 F. 2d 232 (1967), and *Glavic* v. *Beechie*, 225 F. Supp. 24 (1963), aff'd, 340 F. 2d 91 (1964). It may further be noted that § 243 (h), by its terms, "authorizes" but does not require the consideration of persecution claims.

parture of the vessel renders § 252 (b) inapplicable (a suggestion we consider and reject in Part III, below), then 8 CFR § 253.1 (e) likewise becomes inapplicable.

Section 253.1 (e) applies, however, to "[a]ny alien crewman . . . whose conditional landing permit issued under § 252.1 (d)(1) [of 8 CFR] . . . is revoked"—precisely respondent's situation—and makes no reference to the departure, *vel non*, of the vessel. Granting that this regulation and its successor provision are not free from ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it to apply even when the vessel has departed. *E. g., Kordic* v. *Esperdy*, 386 F. 2d 232 (1967); *Glavic* v. *Beechie*, 225 F. Supp. 24 (1963), aff'd, 340 F. 2d 91 (1964). "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 414 (1945).

In sum, it is immaterial to the decision in this case whether § 252 (b)'s exception to the § 242 (b) procedure is, or is not, applicable to respondent. These two provisions govern only the revocation of temporary landing permits and the determination of deportability, and we reiterate that respondent does not contest the District Director's action on either of these scores. These sections do not state who should hear and determine a request for asylum. That is a matter governed by regulation, and under the applicable regulation the respondent received his due.

III.

We do not rest on this ground alone, however. Both the court below and the Court of Appeals for the Second Circuit in *Kordic* v. *Esperdy*, 386 F. 2d 232 (1967), assumed that a crewman's statutory entitlement to a

§ 242 (b) hearing on his request for asylum was coextensive with his right to a § 242 (b) hearing on his statutory deportability, and the case was argued here primarily on that basis. For the balance of the opinion we thus make, *arguendo*, the same assumption. We conclude, contrary to the court below, that an alien crewman may properly be deported pursuant to § 252 (b) even after his ship has sailed.

A.

Section 242 (b) of the Immigration and Nationality Act provides a generally applicable administrative procedure pursuant to which a special inquiry officer determines whether an alien is deportable. See nn. 1 and 2, *supra*.

The history of § 252 (b)'s narrow exception to the § 242 (b) deportation procedure is found in the Report of the Senate Committee on the Judiciary, S. Rep. No. 1515, 81st Cong., 2d Sess., which preceded the enactment of the Immigration and Nationality Act. Alien crewmen had traditionally been granted the privilege of temporary admission or shore leave "because of the necessity of freeing international commerce from unnecessary barriers and considerations of comity with other nations . . . ." *Id.*, at 546. A serious problem was created, however, by alien crewmen who deserted their ships and secreted themselves in the United States. The Committee found that:

> "[T]he temporary 'shore leave' admission of alien seamen who remain illegally constitutes one of the most important loopholes in our whole system of restriction and control of the entry of aliens into the United States. The efforts to apprehend these alien seamen for deportation are encumbered by many technicalities invoked in behalf of the alien seamen

> and create conditions incident to enforcement of the laws which have troubled the authorities for many years." *Id.*, at 550.

To ameliorate this problem, the Committee recommended that:

> "Authority should be granted to immigration officers in a case where the alien crewman intends to depart on the same vessel on which he arrived, upon a satisfactory finding that an alien is not a bona fide crewman, to revoke the permission to land temporarily, to take the alien into custody, and to require the master of the vessel on which he arrived to detain him and remove him from the country." *Id.*, at 558.

Unlike § 242 (b), § 252 (b) does not prescribe the procedures governing the determination of the crewman's deportability, nor does it confine that determination to a special inquiry officer.

B.

As the Court of Appeals noted, the § 252 (b) procedure governs a narrow range of cases only. It is entirely inapplicable to persons other than alien crewmen. It does not apply to an alien crewman who enters the United States illegally without obtaining any landing permit at all, or who enters on a "D–2" permit allowing him to depart on a different vessel. See n. 4, *supra*. The Service has held § 252 (b) to be inapplicable even to a crewman issued a D–1 permit unless formal revocation—as distinguished from actual deportation—takes place before his vessel leaves American shores.[11] *Matter of M——*, 5 I. & N. Dec. 127 (1953); 8 CFR § 252.2; see

[11] This is responsive to the language of §252 (b). Permission to land terminates upon the vessel's departure, and thereafter there is nothing to "revoke."

Cheng Fan Kwok v. *Immigration Service*, 392 U. S. 206, 207 (1968).

Section 252 (b) most plainly governs the situation in which a D–1 landing permit is revoked and the alien crewman is immediately returned to the vessel on which he arrived, which, by hypothesis, is still in a United States port. At the time of revocation, the crewman usually has not traveled far from the port,[12] so the burden of transporting him back to the vessel is small; there is a readily identifiable vessel and place to return him to; and during his brief shore leave, which cannot exceed 29 days, the crewman is unlikely to have established significant personal or business relationships in the United States. In short, the crewman's deportation may be expedited, with minimum hardship and inconvenience to him, to the transportation company responsible for him,[13] and to the Service.

That this is not the only situation to which the § 252 (b) procedure applies, however, is evident from the language of § 252 (b) itself and the related provisions of § 254.[14] Section 252 (b) requires that where an alien crewman's landing permit is revoked his transportation company must detain him aboard the vessel on which he arrived, and deport him. Section 254 (a) imposes a fine on the company and ship's master, *inter alia*,

[12] 8 CFR § 252.2 (d) provides that a "crewman granted a conditional permit to land under section 252 (a) (1) of the Act . . . is required to depart with his vessel from its port of arrival and from each other port in the United States to which it thereafter proceeds coastwise without touching at a foreign port or place; however, he may rejoin his vessel at another port in the United States before it touches at a foreign port or place if he has advance written permission from the master or agent to do so." In the latter case the crewman may journey some distance from the port at which he arrived.

[13] See *infra*, this page and at 76.

[14] 66 Stat. 221, 8 U. S. C. § 1284.

for failure to detain or deport the crewman "if required to do so by an immigration officer." However, § 252 (b)'s requirement is modified by the term, *"if practicable"*; and § 254 (c) correlatively provides:

> "If the Attorney General finds that deportation of an alien crewman . . . on the vessel or aircraft on which he arrived is impracticable or impossible, or would cause undue hardship to such alien crewman, he may cause the alien crewman to be deported from the port of arrival or any other port on another vessel or aircraft of the same transportation line, unless the Attorney General finds this to be impracticable."

These provisions contemplate that an alien crewman whose temporary landing permit is revoked pursuant to § 252 (b) may be deported on a vessel other than the one on which he arrived. The other vessel should preferably be one owned by the transportation company which brought him to the United States,[15] but if this is not feasible, the Attorney General may order him deported by other means, at the company's expense.

The Court of Appeals recognized that an alien crewman might properly be deported on a vessel other than the one which brought him. It noted, however, that § 254 (c) holds the owner of that vessel responsible for all of the expenses of his deportation and further provides that the vessel shall not be granted departure clearance until those expenses are paid or their payment is guaranteed.[16] From this it concluded that "the section

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[15] This is doubtless an accommodation made in the light of the transportation company's liability for the expenses of deportation.

[16] "All expenses incurred in connection with such deportation, including expenses incurred in transferring an alien crewman from one place in the United States to another under such conditions and safeguards as the Attorney General shall impose, shall be paid by the owner or owners of the vessel or aircraft on which the alien

contemplates that the alternative arrangement shall be made while the vessel upon which the crewman arrived is still in port . . . ." 393 F. 2d, at 546. Since arrangements for respondent's deportation had not been made before the M/V *Sumadija* departed, the § 254 (c), and hence the § 252 (b), procedures were no longer applicable: with the ship's departure, respondent became entitled to a hearing pursuant to § 242 (b).

We agree that the "clearance" provision of § 254 (c) contemplates that the crewman's departure on another vessel may *sometimes* be accomplished or arranged before the vessel that brought him departs. If, however, the crewman's vessel sails before its owner has paid or guaranteed the expenses of deportation, the owner's liability under § 254 (c) is in no way diminished. The Government has merely lost a useful means of compelling payment of costs which may still be collected by other methods.[17] Indeed, as the Court of Appeals itself noted, § 254 (c)'s financial responsibility provision is not limited to instances of deportation pursuant to § 252 (b), but applies to the deportation of alien crewmen in a variety of situations, including those in which a § 242 (b) proceeding has been held, and thus those in which the crewman's vessel may long since have departed.[18]

Strong policies support the conclusion that a properly commenced § 252 (b) proceeding does not automatically

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arrived in the United States. The vessel or aircraft on which the alien arrived shall not be granted clearance until such expenses have been paid or their payment guaranteed to the satisfaction of the Attorney General. . . ." § 254 (c).

[17] Thus, if and when respondent is deported, the owners of the M/V *Sumadija* will be responsible for the related expenses incurred by the United States.

[18] And, although we do not decide this question, § 254 (c) would appear to allow the Attorney General to require security for the payment of anticipated expenses of deporting an alien crewman, even though no final arrangements have been made before the vessel that brought him departs.

abort upon the departure of the crewman's vessel. If the crewman whose landing permit has been revoked pursuant to § 252 (b) attacks the district director's action in a federal court, the court would usually stay his deportation pending at least a preliminary hearing. Even courts with dockets less crowded than those of most of our major port cities [19] may not be able to hear the matter for several days or more, during which time the vessel may often have departed according to schedule. It requires little legal talent, moreover, to manufacture a colorable case for a temporary stay out of whole cloth, and to delay proceedings once in the federal courts. The Ninth Circuit's construction would, thus, encourage frivolous applications and intentional delays designed to assure that the crewman's vessel departed before the case was heard. Alternatively, it would so dispose federal judges not to grant stays that persons presenting meritorious applications might be deported without the opportunity to be heard.

We agree with the court below that § 252 (b) is a provision of limited applicability. But we conclude that the court's construction would restrict its scope to a degree neither intended by Congress nor supported by the language of the Act, and that it would, as a practical matter, render § 252 (b) useless for the very function it was designed to perform.

We hold that an alien crewman whose temporary landing permit is properly revoked pursuant to § 252 (b) does not become entitled to a hearing before a special inquiry officer under § 242 (b) merely because his deportation is not finally arranged or effected when his vessel leaves, and that under these circumstances the Attorney General

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[19] See generally 1968 Director of the Administrative Office of the United States Courts Ann. Rep., Tables C, D, and X (1968).

may provide—as he did in 8 CFR § 253.1 (e), now 8 CFR § 253.1 (f)—that the crewman's request for political asylum be heard by a district director of the Immigration and Naturalization Service.

IV.

At the time of respondent's January 1965 hearing before the District Director, § 243 (h) of the Immigration and Nationality Act provided:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to *physical persecution* . . . ." [20] (Emphasis added.)

By the Act of October 3, 1965, § 11 (f), 79 Stat. 918, this section was amended by substituting for "physical persecution" the phrase "persecution on account of race, religion, or political opinion." Although 8 CFR § 253.1 (e), the regulation under which respondent's 1965 hearing was conducted, did not itself contain any restriction to "physical persecution," it is apparent from the District Director's findings that he read such a limitation into the regulation.[21]

We believe, therefore, that it is appropriate that respondent be given a new hearing before the District Director under the appropriate standard, and we remand the case for that purpose.[22]

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[20] 66 Stat. 214.

[21] See *supra*, at 68; Appendix 18–22 *passim*.

[22] Respondent contends that his 1965 proceeding was infected with various constitutional errors, including the District Director's alleged bias and his combination of prosecutorial, investigative, and adjudicatory functions. Because that proceeding is not before us, and because we remand for a new hearing, we have no occasion to consider these arguments, except to note that neither § 252 (b) of the

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Two procedures for the deportation of aliens are relevant in this case. The first is set forth in § 242 (b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. § 1252 (b), and is the procedure required in most instances when the Government seeks to deport an alien. Under § 242 (b) a number of procedural safeguards are specified to insure that an alien is given the full benefit of a complete and fair hearing before the harsh consequence of deportation can be imposed on him.[1] The second procedure involved in this case is set

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Immigration and Nationality Act nor 8 CFR § 253.1 (f), under which respondent will be heard on remand, is unconstitutional on its face. Likewise, it is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968. See Dept. State Bull., Vol. LIX, No. 1535, p. 538.

[1] Section 242 (b) provides as follows:

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. . . . No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not incon-

forth in § 252 (b). It is applicable only under very special circumstances involving alien seamen who enter this country under conditional landing permits. Section 252 (b) provides for a short, summary procedure.[2] Unlike § 242 (b), the first provision mentioned, this second provision does not require that the hearing officer be someone unconnected with the investigation and prosecution of the case. It does not require specific trial safeguards such as the rights to notice, counsel, and cross-

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sistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

"(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

"(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

"(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

[2] Section 252 (b) provides as follows:

"Pursuant to regulations prescribed by the Attorney General, any immigration officer may, in his discretion, if he determines that an alien is not a bona fide crewman, or does not intend to depart on the vessel or aircraft which brought him, revoke the conditional permit to land which was granted such crewman under the provisions of subsection (a)(1), take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States. Until such alien is so deported, any expenses of his detention shall be borne by such transportation company. Nothing in this section shall be construed to require the procedure prescribed in section 242 of this Act to cases falling within the provisions of this subsection."

examination of witnesses. Indeed, § 252 (b) apparently does not require that the alien be given any hearing at all but would seem to authorize an immigration officer to order immediate arrest and summary deportation on the basis of any information coming to him in any way at any time. The question before the Court is therefore not the apparently insignificant question suggested by the Court's opinion—namely, whether this alien's case was properly determined by an official with one title, "District Director," rather than another title, "special inquiry officer." Instead, the question is the crucially significant one whether an alien seaman about to be forced to leave the country is entitled under the circumstances of this case to the benefit of safeguards that were carefully provided by Congress to insure greater fairness and reliability in deportation proceedings.

The regulations relied on by the Court in Part II of its opinion do not provide an independent basis for its holding. Among the relevant regulations, 8 CFR § 242.8 (a) applies "[i]n any proceeding conducted under this part," namely "Part 242—Proceedings to Determine Deportability of Aliens in the United States: Apprehension, Custody, Hearing, and Appeal." The regulation is thus designed to spell out further the details of proceedings required to be conducted under § 242 of the statute, and this regulation explicitly authorizes the special inquiry officer "to order temporary withholding of deportation pursuant to section 243 (h) of the Act [the political persecution provision]." In contrast, the regulations relied upon by the Court as authorizing a District Director to decide this issue, in particular former 8 CFR § 253.1 (e), apply by their own terms only to the procedure for "parole" of an alien under § 212 (d)(5), a remedy distinct from the withholding of deportation under § 243 (h), and by the Government's own admission these regulations are applicable only to "requests for asylum made

by crewmen against whom proceedings under Section 252 (b) have been instituted." Brief for Petitioner 37. Thus, the regulations serve only to spell out the procedures to be followed under both § 242 (b) and § 252 (b) and do not even purport to specify when one of these sections rather than the other is in fact applicable. The fact that the Immigration and Naturalization Service has applied the regulation differently does not change this meaning. As the Court concedes, the regulation is "not free from ambiguity," *ante*, at 72, and of course the ambiguity in the regulation is precisely the same as the ambiguity in the statutory provision from which the wording of the regulation was drawn. It seems clear that the way in which the Service has applied the regulation has been determined by its interpretation of the statute, an interpretation that is in no way binding on us. Both the statute and the regulation are ambiguous, and there is no doubt in my mind that this ambiguity should be resolved in favor of the alien who is seeking a full and fair hearing. With all due respect, I think the Court's involved argument based upon the regulations, which goes beyond anything suggested by the Government itself in this case, provides no basis whatsoever for avoiding the fundamental question of statutory interpretation as to which of the two procedures, § 242 (b) or § 252 (b), was required to be followed in this case.

The Government contends that respondent, the alien seaman involved here, could be properly deported under the special summary procedures of § 252 (b) because his conditional landing permit was revoked and because § 252 (b) authorizes summary deportation after this permit is revoked. Respondent, however, argued in the Court of Appeals that he should have been given the benefit of the careful hearing procedures spelled out by Congress in § 242 (b) because the ship on which he came had departed before the decision of the District

Director was made, and therefore the only justification for the fast but ordinarily less desirable procedure of § 252 (b) no longer existed. The Court of Appeals held that § 252 (b) proceedings were authorized only prior to the departure of the ship. I agree with the Court of Appeals. As that court noted in its opinion:

> "The section [252 (b)] exception [to the general procedural requirements of § 242 (b)] is very narrowly drawn. It does not apply to the deportation of crewmen who have 'jumped ship' and entered the United States illegally, with no permit at all. As noted above, it does not apply to crewmen issued landing permits authorizing them to depart on vessels other than those on which they arrived. It does not apply to crewmen who have overstayed the twenty-nine day leave period without revocation of their landing permits. It does not apply to crewmen who were to leave on the vessel on which they arrived if their vessels have departed before their landing permits are revoked. In all of these situations crewmen may be deported only in accordance with [§ 242 (b)] procedures." 393 F. 2d 539, 544.

As the legislative history of the Act, quoted in the opinion of the Court of Appeals, shows, the special truncated procedure of § 252 (b) was intended to be used only when the need for speed was truly pressing—when the ship was about to leave port. But the seaman in this case was subjected to this truncated, summary procedure even though his ship had already gone and the need for haste in completing these important legal proceedings no longer existed. There is no reason to suspect that Congress wanted a seaman to be deprived under these circumstances of the vital procedural safeguards so carefully specified in § 242 (b) of the Act.

I would affirm the judgment of the Court of Appeals.

Syllabus.

NATIONAL BOARD OF YOUNG MEN'S CHRISTIAN ASSNS. ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 517. Argued March 3, 1969.—Decided May 19, 1969.

Petitioners sued the Government in the Court of Claims for just compensation under the Fifth Amendment for riot damage to their two buildings, located in the Atlantic section of the Canal Zone at its boundary with the Republic of Panama, after they were occupied by U. S. Army troops during the January 1964 riots in Panama. On the evening of January 9 a mob entered the buildings, looting and wrecking the interiors, and starting a fire in one. Army troops were moved to the Atlantic section to clear the Zone of rioters and seal the border. Troops entered three buildings, including petitioners', ejected the rioters, and were deployed outside the structures. After considerable assault, sniper fire, and injuries, the troops were moved inside the buildings after midnight. The buildings were under siege during the night and the next morning, and one was set afire. The troops withdrew and the buildings were subjected to heavy fire-bomb attack. Other buildings in the area were damaged or destroyed. The Court of Claims granted the Government's motion for summary judgment, holding that the temporary occupancy of the buildings and the damage inflicted by the rioters during such occupancy did not constitute a taking for Army use under the Fifth Amendment. *Held:* The Fifth Amendment does not require that petitioners be compensated for damages to their buildings resulting from misconduct by rioters following occupation of the buildings by government troops. Pp. 89–93.

(a) Where, as here, a private party is the particular intended beneficiary of governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended to benefit the public. P. 92.

(b) The physical occupation of the buildings by the troops did not deprive petitioners of any use of the buildings, as the buildings were already under siege by rioters, and thus petitioners could only claim compensation for the increased damage by rioters resulting from the presence of the troops. P. 93.

(c) Where the only claim is that governmental action is causally related to private misconduct which results in private property damage, the Fifth Amendment does not require compensation unless the governmental involvement in the deprivation of private property is determined to be sufficiently direct and substantial. P. 93.

(d) The temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough involvement to warrant compensation under the Fifth Amendment. P. 93.

184 Ct. Cl. 427, 396 F. 2d 467, affirmed.

Ronald A. Jacks argued the cause for petitioners. With him on the brief were *Harding A. Orren* and *Sherman L. Cohn.*

Peter L. Strauss argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Acting Assistant Attorney General Taylor, Roger P. Marquis,* and *S. Billingsley Hill.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners brought this suit against the United States in the Court of Claims[1] seeking just compensation under the Fifth Amendment for damages done by rioters to buildings occupied by United States troops during the riots in Panama in January 1964. The Court of Claims held that the actions of the Army did not constitute a "taking" within the meaning of the Fifth Amendment and entered summary judgment for the United States. 184 Ct. Cl. 427, 396 F. 2d 467 (1968). We granted certiorari. 393 U. S. 959 (1968). We affirm.

Petitioners' buildings, the YMCA Building and the Masonic Temple, are situated next to each other on the Atlantic side of the Canal Zone at its boundary with

[1] Jurisdiction in the Court of Claims was based upon 28 U. S. C. § 1491.

the Republic of Panama. Rioting began in this part of the Zone at 8 p. m. on January 9, 1964. Between 9:15 and 9:30 p. m., an unruly mob of 1,500 persons marched to the Panama Canal Administration Building, at the center of the Atlantic segment of the Zone and there raised a Panamanian flag. Many members of the mob then proceeded to petitioners' buildings—and to the adjacent Panama Canal Company Office and Storage Building. They entered these buildings, began looting and wrecking the interiors, and started a fire in the YMCA Building.

At 9:50 p. m., Colonel Sachse, the commander of the 4th Battalion, 10th Infantry, of the United States Army, was ordered to move his troops to the Atlantic segment of the Zone with the mission of clearing the rioters from the Zone and sealing the border from further encroachment. The troops entered the three buildings, ejected the rioters, and then were deployed outside of the buildings. The mob began to assault the soldiers with rocks, bricks, plate glass, Molotov cocktails, and intermittent sniper fire. The troops did not return the gunfire but sought to contain the mob with tear gas grenades. By midnight, one soldier had been killed and several had been wounded by bullets; many others had been injured by flying debris. Shortly after midnight, Colonel Sachse moved his troops inside the three buildings so that the men might be better protected from the sniper fire.

The buildings remained under siege throughout the night. On the morning of January 10, the YMCA Building was the subject of a concentrated barrage of Molotov cocktails. The building was set afire, and in the early afternoon the troops were forced to evacuate it and take up positions in the building's parking lot which had been sandbagged during the night. Following the evacuation, the YMCA Building continued to

be a target for Molotov cocktails. The troops also withdrew from the Masonic Temple on the afternoon of January 10, except that a small observation post on the top floor of the building was maintained. The Temple, like the YMCA Building, continued to be under heavy attack following withdrawal of the troops, the greatest damage being suffered on January 12 as a result of extensive fire-bomb activity. The third building under heavy attack in the area—the Panama Canal Company Office and Storage Building—was totally destroyed on January 11 by a fire started by Molotov cocktails.

On January 13, the mob dispersed, and all hostile action in the area ceased. The auditorium-gymnasium in the YMCA Building had been destroyed, and the rest of the building was badly damaged. The Masonic Temple suffered considerably less damage because of its predominantly concrete and brick construction. Other buildings in the Atlantic segment of the Canal Zone were also damaged or destroyed. These buildings were all located along the boundary between the Zone and the Republic of Panama, and none, except the Office and Storage Building, had been occupied by troops during the riot.

Petitioners' suit in the Court of Claims sought compensation for the damage done to their buildings by the rioters after the troops had entered the buildings. The basic facts were stipulated, and all parties moved for summary judgment. The court found it "abundantly clear from the record . . . that the military units dispatched to the Atlantic side of the Zone by General O'Meara were not sent there for the purpose or with the intention of requisitioning or taking [petitioners'] buildings to house soldiers. Both buildings had previously been looted and damaged by the rioters. Colonel Sachse's men were ordered to remove the Panamanians from the buildings in order to prevent further loss or destruction

and then to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone." 184 Ct. Cl., at 438, 396 F. 2d, at 473–474. Accordingly, the court held that "the temporary occupancy of [petitioners'] buildings and the damage inflicted on them by the rioters during such occupancy did not constitute a taking of the buildings for use by the Army within the contemplation of the fifth amendment . . . ." *Id.*, at 438, 396 F. 2d, at 473. The Government's motion for summary judgment was granted, petitioners' motion for summary judgment was denied, and the case was dismissed.

At the outset, we note that although petitioners claim compensation for all the damage which occurred after the troops retreated into the buildings in the early hours of January 10, there was no showing that any damage occurred because of the presence of the troops. To the contrary, the record is clear that buildings which were not occupied by troops were destroyed by rioters, and that petitioners' very buildings were under severe attack before the troops even arrived. Indeed, if the destroyed buildings have any common characteristic, it is not that they were occupied by American soldiers, but that they were on the border and thus readily susceptible to the attacks of the mobs coming from the Republic of Panama. We do not rest our decision on this basis, however, for petitioners would not have a claim for compensation under the Fifth Amendment even if they could show that damage inflicted by rioters occurred because of the presence of the troops.

The Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); see also *United States* v.

Sponenbarger, 308 U. S. 256, 266 (1939).[2] Petitioners argue that the troops entered their buildings not for the purpose of protecting those buildings but as part of a general defense of the Zone as a whole. Therefore, petitioners contend, they alone should not be made to bear the cost of the damage to their buildings inflicted by the rioters while the troops were inside. The stipulated record, however, does not support petitioners' factual premise; rather, it demonstrates that the troops were acting primarily in defense of petitioners' buildings.

The military had made no advance plans to use petitioners' buildings as fortresses in case of a riot. Nor was the deployment of the troops in the area of petitioners' buildings strategic to a defense of the Zone as a whole. The simple fact is that the troops were sent to that area because that is where the rioters were.[3] And once the troops arrived in the area, their every action was designed to protect the buildings under attack. First, they expelled the rioters from petitioners' buildings and the Office and Storage Building, putting out the fire started by the rioters in the YMCA Building. Then they stood guard outside to defend the buildings from renewed attack by the 2,000 to 3,000 Panamanian rioters who remained in the area. In this defense of petitioners' property the troops suffered considerable losses and were forced to retreat into the buildings.

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[2] For a general discussion of the purposes of the Just Compensation Clause, see Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

[3] It is significant that at the outset of the rioting Colonel Sachse sent one of his companies—"B" Company—to an area several blocks away from petitioners' buildings. It was only because "[t]he number of rioters in the 'B' Company area was practically none" that "B" Company was subsequently sent to the area near petitioners' buildings.

It is clear that the mission of the troops forced inside the buildings continued to be the protection of those buildings. In a fact sheet, to which the parties have stipulated, the General Counsel of the United States Department of the Army stated that:

> "[T]he troops had occupied the buildings in the YMCA-Masonic Temple vicinity *under instructions to protect the property,* [and] their actions, according to all statements taken, were consistent with instructions. A captain, in his affidavit, states that he was given a message by the battalion commander to convey to the officer who had been placed in charge of the Masonic Temple. The order was, in the captain's words, '. . . that if the rioters attempted to enter the building with the intent to do damage to persons or property that appropriate action . . . could be used. . . .' According to the captain, the order went on to state, '. . . Those people on the 1st floor could assume that rioters forcibly entering the building had the intent to do damage to either property or persons.' The officer in charge received that order, and it was passed along to the men. One sergeant's affidavit names the officer, and recounts receiving the order from him. In the sergeant's own words, *'The building would be defended at all costs.'*
>
> "Other statements by individual soldiers describe actions taken to minimize damage which the rioters were attempting to cause. Several soldiers describe throwing and firing rifle-launched tear gas grenades at rioters who were hurling Molotov cocktails at the buildings. Another describes using similar agents 'to keep the crowd from entering the YMCA,' while still others describe action by themselves or other soldiers in physically routing Panamanians from the YMCA after they had come in through the windows." (Italics supplied.)

Colonel Sachse, the commanding officer in the Atlantic riot area, testified to the same effect:

> "The YMCA building was on fire from Molotov cocktails being thrown from the Republic of Panama side into the front of it. We were unable to protect it due to the fact that it is set on the border between the Canal Zone and the Republic of Panama. Therefore we practically lost most of this building by Molotov cocktails."

Thus, there can be no doubt that the United States Army troops were attempting to defend petitioners' buildings. Of course, any protection of private property also serves a broader public purpose. But where, as here, the private party is the particular intended beneficiary of the governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. See *Armstrong* v. *United States, supra,* at 49; *United States* v. *Sponenbarger, supra,* at 266. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside.

Petitioners' claim must fail for yet another reason. On oral argument, petitioners conceded that they would have had no claim had the troops remained outside the buildings, even if such presence would have incited the rioters to do greater damage to the buildings. We agree. But we do not see that petitioners' legal position is improved by the fact that the troops actually did occupy the buildings. Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation. See, *e. g.*, *United States* v. *General Motors,* 323 U. S. 373, 378

(1945). There are, however, unusual circumstances in which governmental occupation does not deprive the private owner of any use of his property. For example, the entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises. In the instant case, the physical occupation by the troops did not deprive petitioners of any use of their buildings. At the time the troops entered, the riot was already well under way, and petitioners' buildings were already under heavy attack. Throughout the period of occupation, the buildings could not have been used by petitioners in any way. Thus, petitioners could only claim compensation for the increased damage by rioters resulting from the presence of the troops. But such a claim would not seem to depend on whether the troops were positioned in the buildings. Troops standing just outside a building could as well cause increased damage by rioters to that building as troops positioned inside. In either case—and in any case where government action is causally related to private misconduct which leads to property damage—a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment. The Constitution does not require compensation every time violence aimed against government officers damages private property. Certainly, the Just Compensation Clause could not successfully be invoked in a situation where a rock hurled at a policeman walking his beat happens to damage private property. Similarly, in the instant case, we conclude that the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment. We have no occasion to decide whether

compensation might be required where the Government in some fashion not present here makes private property a particular target for destruction by private parties.

Affirmed.

MR. JUSTICE STEWART, concurring.

If United States military forces should use a building for their own purposes—as a defense bastion or command post, for example—it seems to me this would be a Fifth Amendment taking, even though the owner himself were not actually deprived of any personal use of the building. Since I do not understand the Court to hold otherwise, I join its judgment and opinion.

MR. JUSTICE HARLAN, concurring in the result.

At the time the military retreated into the YMCA and the Masonic Temple, three alternative courses of action were open to the army commander. First, the troops could have continued their prior strategy and stood their ground in front of the buildings without returning the rioters' hostile sniper fire; second, the troops could have stood their ground and attempted to repel the mob by the use of deadly force; third, the troops could have retreated from the entire area, leaving the mob temporarily in control. The petitioners argue that if the troops had adopted either of the first two of these alternative strategies, their buildings would not have suffered the damage which resulted from the military's occupation.

But what if the military had adopted the third strategy open to it? If the army had completely abandoned the area to the rioters, and regrouped for a later counterattack, there can be little doubt on this record that the rioters would have subjected the buildings to greater damage than that which was in fact suffered. I believe this fact to be decisive. For it appears to me that, in riot control situations, the Just Compensation Clause

may only be properly invoked when the military had reason to believe that its action placed the property in question in greater peril than if *no* form of protection had been provided at all.

I.

I start from the premise that, generally speaking, the Government's complete failure to provide police protection to a particular property owner on a single occasion does not amount to a "taking" within the meaning of the Fifth Amendment. Every man who is robbed on the street cannot demand compensation from the Government on the ground that the Fifth Amendment requires fully effective police protection at all times. The petitioners do not, of course, argue otherwise. Yet surely the Government may not be required to guarantee fully effective protection during serious civil disturbances when it is apparent that the police and the military are unable to defend all the property which is threatened by the mob. If the owners of *unprotected* property remain uncompensated, however, there seems little justice in compensating petitioners, who merely contend that the military occupation of their buildings provided them with *inadequate* protection.

Petitioners' claim that they may recover on a bare showing that they were afforded "inadequate" protection has an additional defect which should be noted. If courts were required to consider whether the military or police protection afforded a particular property owner was "adequate," they would be required to make judgments which are best left to officials directly responsible to the electorate. In the present case, for example, petitioners could argue that it was possible for the troops to maintain their position in front of the buildings if they had been willing to kill a large number of rioters. In rebuttal, the Government could persuasively argue that the indiscriminate use of deadly force would have en-

raged the mob still further and would have increased the likelihood of future disturbances. Which strategy is a court to accept? Clearly, it is far sounder to defer to the other duly constituted branches of government in this regard.

It is, then, both unfair and unwise to favor those who have obtained some form of police protection over those who have received none at all. It is only if the military or other protective action foreseeably *increased* the risk of damage that compensation should be required. Since, in the present case, the military reasonably believed that petitioners' property was better protected if the troops retreated into the buildings, rather than from the entire area, the property owners have no claim to compensation on the ground that the protection afforded to them was "inadequate."

I must emphasize, however, that the test I have advanced should be applied only to government actions taken in an effort to control a riot. The Army could not, for example, appropriate the YMCA today and claim that no payment was due because the building would have been completely demolished if the military had not intervened during the riot. Once tranquility has been restored, property owners may legitimately expect that the Government will not deprive them of the property saved from the mob. But while the rioters are surging through the streets out of control, everyone must recognize that the Government cannot protect all property all of the time. I think it appropriate to say, however, that our decision today does not in any way suggest that the victims of civil disturbances are undeserving of relief. But it is for the Congress, not this Court, to decide the extent to which those injured in the riot should be compensated, regardless of the extent to which the police or military attempted to protect the particular property which each individual owns.

II.

While I agree with the Court that no compensation is constitutionally available under the facts of this case, I have thought it appropriate to state my own views on this matter since the precise meaning of the rules the majority announces remains obscure at certain critical points. Moreover, in deciding this particular case we should spare no effort to search for principles that seem best calculated to fit others that may arise before American democracy once again regains its equilibrium.

The Court sets out two tests to govern the application of the Just Compensation Clause in riot situations. It first denies petitioners recovery on the ground that each was the "particular intended beneficiary" of the Government's military operations. *Ante,* at 92. I do not disagree with this formula if it means that the Fifth Amendment does not apply whenever the policing power reasonably believes that its actions will not increase the risk of riot damage beyond that borne by the owners of unprotected buildings. But the language the Court has chosen leaves a good deal of ambiguity as to its scope. If, for example, the military deliberately destroyed a building so as to prevent rioters from looting its contents and burning it to the ground, it would be difficult indeed to call the building's owner the "particular intended beneficiary" of the Government's action. Nevertheless, if the military reasonably believed that the rioters would have burned the building anyway, recovery should be denied for the same reasons it is properly denied in the case before us. Cf. *United States* v. *Caltex, Inc.,* 344 U. S. 149 (1952).

Moreover, the Court's formula might be taken to indicate that if the military's *subjective* intention was to protect the building, the courts need not consider whether this subjective belief was a reasonable one.

While the widest leeway must, of course, be given to good-faith military judgment, I am not prepared to subscribe to judicial abnegation to this extent. If a court concludes, upon convincing evidence, that the military had good reason to know that its actions would significantly increase the risk of riot damage to a particular property, compensation should be awarded regardless of governmental good faith.

While I accept the Court's "intended beneficiary" test with these caveats, I cannot subscribe to the second ground the majority advances to deny recovery in the present case. The majority analogizes this case to one in which the military simply posted a guard in front of petitioners' properties. It is said that if the rioters had damaged the buildings as a part of their attack on the troops standing in front of them, the property damage caused would be too "indirect" a consequence of the military's action to warrant awarding Fifth Amendment compensation. It follows, says the Court, that even if the military's occupation of the buildings *increased* the risk of harm far beyond any alternative military strategy, the Army's action is nevertheless too "indirect" a cause of the resulting damage.

This argument, however, ignores a salient difference between the case the Court hypothesizes and the one which we confront. If the troops had remained on the street, they would not have obtained any special benefit from the use of petitioners' buildings. In contrast, the military did in this instance receive a benefit not enjoyed by members of the general public when the troops were ordered to occupy the YMCA and the Masonic Temple. As the Court's statement of the facts makes clear, the troops retreated into the buildings to protect themselves from sniper fire. Ordinarily, the Government pays for private property used to shelter its officials,

and I would see no reason to make an exception here *if* the military had reason to know that the buildings would have been exposed to a lesser risk of harm if they had been left entirely unprotected.

On the premises set forth in this opinion, I concur in the judgment of the Court.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court says that: "Shortly after midnight, Colonel Sachse moved his troops inside the three buildings [which included the two buildings for which compensation is here sought] so that the men might be better protected from the sniper fire." *Ante,* at 87. The Army selected those two buildings to protect itself while carrying out its mission of safeguarding the entire zone from the rioters. Thus, the Army made the two buildings the particular targets of the rioters and the buildings suffered heavy damage. The Army's action was taken not to save the buildings but to use them as a shelter and fortress from which, as the Court of Claims found, "to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone." 184 Ct. Cl. 427, 438, 396 F. 2d 467, 474 (1968). At that time, I think it can hardly be said that these private buildings were taken for the good of the owners. Instead, the taking by the Army was for the benefit of the public generally. I still feel that "the guiding principle should be this: Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss." *United States* v. *Caltex, Inc.,* 344 U. S. 149, 156 (1952) (dissenting opinion of MR. JUSTICE DOUGLAS).

ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 49. Argued January 22, 1969.—Decided May 19, 1969.

Upon the expiration in 1959 of petitioner, Zenith's, license agreement with Hazeltine Research, Inc. (HRI), which permitted Zenith to use all of HRI's domestic radio and television patents under HRI's so-called standard package license, Zenith refused to renew, asserting that it no longer required a license. HRI brought a patent infringement suit in November 1959. Zenith's answer alleged invalidity of the patent, noninfringement, patent misuse by HRI, and HRI's unclean hands through conspiracy with foreign patent pools. In May 1963 Zenith counterclaimed against HRI for treble damages and injunctive relief, alleging Sherman Act violations by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, its parent Hazeltine Corp. (Hazeltine), and patent pools in Canada, England, and Australia. Zenith contended that the patent pools refused to license the foreign patents, including Hazeltine's, placed within their exclusive licensing authority, to Zenith and others seeking to export American-made radios and television sets into those foreign markets. HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation. Hazeltine was not served with the counterclaim or named as a party, and made no appearence until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." The District Court, sitting without a jury, ruled for Zenith on the infringement action, and on the counterclaim held that (1) HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license and by insisting on extracting royalties from unpatented products, and (2) HRI and Hazeltine conspired with foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. With respect to patent misuse, judgment was entered for Zenith for treble the actual damages of approximately $50,000, and injunctive relief given against further misuse. Treble damages for almost $35,000,000 were awarded Zenith on the conspiracy claim, together with injunctive relief against further par-

ticipation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market. Relying on the "one entity" stipulation, the court entered the judgments for treble damages and injunctive relief against Hazeltine as well as HRI. The Court of Appeals set aside the judgments against Hazeltine, ruling that the lower court lacked jurisdiction over that company and that the stipulation was an insufficient basis for entering judgment against Hazeltine. On the patent misuse claim, the treble-damage award against HRI was affirmed, but the injunction against further misuse was modified. The conspiracy treble-damage award was reversed, the Court of Appeals holding that Zenith had failed to prove it had in fact been injured during the relevant four-year period preceding the filing of its counterclaim. That court also struck down the injunction against HRI's participation in conspiracies restricting Zenith's foreign trade. *Held:*

1. One is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. Pp. 108–112.

(a) The judgments against Hazeltine were properly vacated as Hazeltine was not named as a party or served, and did not formally appear at the trial; and the stipulation executed by HRI was not an adequate substitute for the normal means of obtaining jurisdiction over Hazeltine. P. 110.

(b) It was error to enter an injunction against Hazeltine without determining that it was "in active concert or participation" with HRI in a proceeding in which Hazeltine was a party. P. 112.

2. The Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Pp. 114–125.

(a) The evidence was sufficient to sustain a finding that the Canadian patent pool refused to license imported goods, thus excluding foreign manufacturers like Zenith from the Canadian market for radio and television products. P. 118.

(b) The evidence clearly warrants the inference that the Canadian patent pool's past conduct interfered with and made more difficult the distribution of Zenith products in the relevant 1959–1963 period; and it could rationally be found that Zenith suffered damage during the pertinent period from having a smaller share of the market than it would have had if the pool had never existed. Pp. 118–119.

(c) The evidence is sufficient to support a finding of damage resulting from events occurring after the damage period began. Pp. 119–123.

(d) In applying the clearly erroneous standard of Fed. Rule Civ. Proc. 52 (a) to the findings of a district court sitting without a jury, the appellate court must determine whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed," and not whether it would have made the same findings the trial court did. P. 123.

(e) Where a treble-damage plaintiff seeks recovery for injuries from a total or partial market exclusion, a court may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264. Pp. 123–124.

(f) The trial court was entitled to infer from the circumstantial evidence that the necessary causal relation between the Canadian patent pool's conduct and the claimed damage existed. Pp. 124–125.

3. The Court of Appeals properly set aside the District Court's judgment with respect to injury to Zenith by the English patent pool, as the only permissible inference from the record is that Zenith did not enter the English television market because it was awaiting a change in the English line-scanning signal and not because of the activities of the patent pool. Pp. 125–128.

4. The Court of Appeals correctly reversed the lower court's damages award with respect to the Australian market as nothing in the record permits the inference that Zenith either intended or was prepared to enter the Australian market during the relevant period. Pp. 128–129.

5. Injunctive relief under § 16 of the Clayton Act is available even though the plaintiff has not suffered actual injury as long as he demonstrates a significant threat of injury from an impending antitrust violation or from a contemporary violation likely to continue or recur. Pp. 129–133.

(a) Injunctive relief against HRI with respect to the Canadian market was wholly proper, as the trial court found that HRI and the Canadian patent pool were conspiring to exclude Zenith

and others from the Canadian market, and there was nothing to indicate that this clear violation of the antitrust laws had terminated or that the threat to Zenith would cease in the foreseeable future. Pp. 131–132.

(b) The injunction which barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign markets is also reinstated, in light of HRI's antitrust violation by its conspiring with the Canadian pool, its participation in similar pools in England and Australia, and Zenith's interest in expanding its foreign markets. Pp. 132–133.

6. Conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent amounts to patent misuse. Pp. 133–140.

(a) If convenience of the parties rather than patent power dictates a percentage-of-total-sales royalty provision there is no misuse of the patents. *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827. Pp. 137–138.

(b) A licensee, who obtains the privilege of using the patent and insurance against infringement suits, must anticipate some minimum charge for the license, enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all, but the patentee's statutory monopoly cannot be used to coerce an agreement to pay a percentage royalty on goods not using the patent. Pp. 139–140.

7. The matter is remanded to the Court of Appeals for it to consider whether the trial court correctly determined that HRI conditioned the grant of licenses upon the payment of royalties on unpatented products, and, if so, whether such misuse embodies the ingredients of a violation of either § 1 or § 2 of the Sherman Act, or whether Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. Pp. 140–141.

388 F. 2d 25, affirmed in part, reversed in part, and remanded.

Thomas C. McConnell argued the cause for petitioner. With him on the briefs were *Philip J. Curtis* and *Francis J. McConnell.*

John T. Chadwell and *Victor P. Kayser* argued the cause for respondents. With them on the briefs for respondent Hazeltine Research, Inc., were *C. Lee Cook, Jr.*,

Joseph V. Giffin, M. Hudson Rathburn, and *Laurence B. Dodds.* With *Messrs. Chadwell* and *Kayser* on the brief for Hazeltine Corp. were *Messrs. Cook* and *Giffin.*

Solicitor General Griswold, Assistant Attorney General Zimmerman, and *Harris Weinstein* filed a brief for the United States as *amicus curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner Zenith Radio Corporation (Zenith) is a Delaware Corporation which for many years has been successfully engaged in the business of manufacturing radio and television sets for sale in the United States and foreign countries. A necessary incident of Zenith's operations has been the acquisition of licenses to use patented devices in the radios and televisions it manufactures, and its transactions have included licensing agreements with respondent Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television fields. HRI is the wholly owned subsidiary of respondent Hazeltine Corporation (Hazeltine), a substantially larger and more diversified company that has among its assets numerous foreign patents—including the foreign counterparts of HRI's domestic patents—which it licenses for use in foreign countries.

Until 1959, Zenith had obtained the right to use all HRI domestic patents under HRI's so-called standard package license. In that year, however, with the expiration of Zenith's license imminent, Zenith declined to accept HRI's offer to renew, asserting that it no longer required a license from HRI. Negotiations proceeded to a stalemate, and in November 1959, HRI brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents on a particular automatic control system. Zenith's answer alleged invalidity of the patent asserted and nonin-

fringement, and further alleged that HRI's claim was unenforceable because of patent misuse as well as unclean hands through conspiracy with foreign patent pools. On May 22, 1963, more than three years after its answer had been filed, Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, Hazeltine, and patent pools in Canada, England, and Australia. Zenith contended that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and televisions into those foreign markets.

The District Court, sitting without a jury, ruled for Zenith in the infringement action, 239 F. Supp. 51, 68–69, and its judgment in that respect, which was affirmed by the Court of Appeals, 388 F. 2d 25, 30–33, is not in issue here. On the counterclaim, the District Court ruled, first, that HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license, and by insisting on extracting royalties from unpatented products. 239 F. Supp., at 69–72, 76–77. Judgment was entered in Zenith's favor for treble the amount of its actual damages of approximately $50,000, and injunctive relief against further patent misuse was awarded. Second, HRI and Hazeltine were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. Hazeltine had granted the pools the exclusive right to license Hazeltine patents in their respective countries and had shared in the pools' profits, knowing that each pool refused to license its patents for importation and that each enforced its ban on imports with threats of infringement suits. HRI, along with its coconspirator, Hazeltine, was therefore held to have conspired

with the pools to restrain the trade or commerce of the United States, in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and was liable for injury caused Zenith's foreign business by the operation of the pools. 239 F. Supp., at 77–78. Total damages with respect to the three markets, when trebled, amounted to nearly $35,000,000.[1] Judgment in this

[1] In its initial findings, handed down on January 25, 1965, 239 F. Supp., at 76, the District Court concluded that Zenith had suffered actual damages of $16,238,872 as a result of the restraints imposed by the three pools upon Zenith's export business during the four-year damage period:

Canada:	
Television	$5,826,896
Radio	470,495
England:	
Television	8,079,859
Radio	1,169,067
Australia:	
Television	625,786
Radio	66,769
Total	16,238,872

On April 5, 1965, the District Court entered partial judgment, awarding Zenith treble damages for patent misuse and treble damages with respect to Canada, but reserving jurisdiction for further hearings on damages in the English and Australian markets. The further proceedings were held in October and November 1965, after which the District Court amended its findings on damages for England and Australia:

England:	
Television	$4,312,924
Radio	745,102
Australia:	
Television	223,508
Radio	24,952
Total	5,306,486

These revisions reflect the proof submitted at the further proceedings, showing that government embargoes in England and Australia, in

amount was awarded Zenith, along with injunctive relief against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market.

Relying upon its finding that HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation, see 239 F. Supp., at 69, the court entered judgments for treble damages and injunctive relief, both with respect to patent misuse and conspiracy, against Hazeltine as well as against the named counter-defendant, HRI.

On appeal by HRI and Hazeltine, the Court of Appeals set aside entirely the judgments for damages and injunctive relief entered against Hazeltine, ruling that the District Court lacked jurisdiction over that company and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against Hazeltine. 388 F. 2d, at 28–30. With respect to Zenith's patent misuse claim, the Court of Appeals affirmed the treble-damage award against HRI, but modified in certain respects the District Court's injunction against further misuse. 388 F. 2d, at 33–35, 39.

The Court of Appeals also reversed the treble-damage award for conspiracy to restrain Zenith's export trade. Without reaching any of the other issues presented by the appeal on this phase of the case, the court held that Zenith had failed to sustain its burden under § 4 of the

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effect until 1959 and 1960 respectively, precluded entry by Zenith into the English and Australian markets. The District Court found, with respect to England, that because of the embargoes, Zenith's damages were zero for the first year of the damage period, 50% of the figure initially accepted by the court for the second year, 75% for the third, and 100% for the fourth. With respect to Australia, the District Court adopted a similar 0–50–75–100% revision of the original figures used by the court in computing the damage findings of January 25, 1965.

Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, to prove the fact of damage—injury to its business—within the relevant four-year period preceding May 22, 1963, the date Zenith's counterclaim was filed.[2] Finally, the Court of Appeals struck the injunction against HRI's participation in conspiracies restricting Zenith's trade in foreign markets.

We granted certiorari, 391 U. S. 933, to consider among other things the question whether the Court of Appeals properly discharged its appellate function under Rule 52 (a) of the Federal Rules of Civil Procedure, which specifies that the findings of fact made by a District Court sitting without a jury are not to be set aside unless "clearly erroneous."

I. The Judgments Against Hazeltine.

The named plaintiff in the patent infringement complaint which began this litigation was HRI, not its parent, Hazeltine; Zenith's counterclaim named only HRI as the "counter-defendant," identifying HRI and Hazeltine as "counter-defendant and its parent." After Zenith had filed its answer and had delivered a draft of its counterclaim to HRI's attorneys—both the answer and the counterclaim alleging that HRI had unlawfully conspired with Hazeltine and foreign patent pools—HRI and Zenith

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[2] The record discloses that Zenith, HRI, and the courts below all considered the damage period to be the four years prior to the date on which Zenith filed its counterclaim. No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959. Cf. *Bull* v. *United States*, 295 U. S. 247, 262 and n. 10 (1935); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 285 F. 2d 231 (C. A. 6th Cir. 1960), cert. denied, 366 U. S. 911 (1961). Cf. Fed. Rule Civ. Proc. 15 (c) (amended pleading relates back to date of original pleading if the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading").

stipulated that "for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company."

On May 22, 1963, two weeks after the stipulation had been signed, Zenith filed its counterclaim, seeking money damages from HRI and an injunction against HRI and those "in privity" with it. Hazeltine was not served with the counterclaim and was not named as a party, although it was alleged to be a coconspirator with HRI and the foreign patent pools. Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." Insofar as the record reveals, Hazeltine did not formally participate in the proceedings until after the District Court had entered its initial findings of fact and conclusions of law. On April 5, 1965, after Hazeltine's special appearance, the trial judge entered judgment against Hazeltine as well as HRI, thereby rejecting Hazeltine's objection that the court was without jurisdiction over it. Apparently, the trial court based its decision on the pretrial stipulation [3] and its earlier finding that:

> "The parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent,

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[3] During the proceedings before the District Court on April 2, 1965, the trial judge noted: "Well, of course, Hazeltine Corporation wasn't a party to the lawsuit." The court's reliance upon the stipulation as a basis for its decision to enter judgment against Hazeltine as well as HRI is reflected by the interchanges between the court and counsel for Hazeltine during those proceedings. An example is the following:

"Mr. Kayser [counsel for Hazeltine]: . . . Could anyone really believe for a minute that if he had any thought of bringing the parent into this lawsuit that he would not have named them and that he would be relying on this stipulation which was intended to simplify and expedite the trial? Would any lawyer who has been practicing for two years expect to hold somebody liable on a judg-

Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics industry in the United States and in foreign countries." 239 F. Supp., at 69.

The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry* v. *Lee*, 311 U. S. 32, 40–41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E. g., Pennoyer* v. *Neff*, 95 U. S. 714 (1878); *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418 (1957).

Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation. The stipulation represented HRI's agreement to be bound by and to be liable for the acts of its parent, but it was signed only by HRI, through its attorney, Dodds. Hazeltine did not execute the stipulation, and Dodds, although an officer of Hazeltine, did not purport to be signing on its behalf. The trial court apparently viewed the stipulation as binding Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it. The stipulation on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them.

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ment when he didn't even name them? He relied on some pretrial stipulation.

"The Court: You mean that pretrial stipulations are worthless?"

Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*; but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue,[4] but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.

Likewise, were it shown that Hazeltine through its officer, Dodds, in fact controlled the litigation on behalf of HRI, and if the claim were made that the judgment against HRI would be *res judicata* against Hazeltine because of this control, that claim itself could be finally adjudicated against Hazeltine only in a court with jurisdiction over that company.[5] See *G. & C. Merriam Co.*

[4] There is some indication that the genesis of the stipulation was a pretrial conference, when a question was raised as to whether or not a subpoena served upon HRI could reach certain records of Hazeltine relating to the latter's foreign patents. Hazeltine, of course, argues that the stipulation's only purpose and effect were to facilitate discovery and trial by obviating the necessity of litigating whether or not Zenith could "pierce the corporate veil" between HRI and its parent.

[5] In its brief in this Court, Zenith seems to argue that Hazeltine is estopped to deny that it is bound by the stipulation. Not only was HRI's counsel, Dodds, an officer of Hazeltine, but also Ruestow and Westermann, Hazeltine's general patent counsel and general

v. *Saalfield*, 241 U. S. 22 (1916); *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260 (1961).

Neither the judgment for damages nor the injunction against Hazeltine was proper. Although injunctions issued by federal courts bind not only the parties defendant in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," Fed. Rule Civ. Proc. 65 (d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party.[6]

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counsel, were present during trial and failed to "repudiate" the construction allegedly given the stipulation by the parties at trial to the effect that it bound Hazeltine to any adjudication on the counterclaim. We find this theory untenable on the record of this case, for the references during trial to the stipulation are equally consistent with the interpretation advanced by Hazeltine that the stipulation merely eliminated the necessity for Zenith to perform the time-consuming task of piercing the corporate veil in proving its counterclaim against HRI. Also, Ruestow and Westermann were called as witnesses during trial, and assuming they were present throughout the trial—a fact which is neither proved nor disproved by the record—their failure to repudiate Zenith's proposed construction of the stipulation is entirely consistent with the proposition that they were present only as witnesses, and not as authorized representatives for a person who might be bound by the litigation.

[6] Just as the *alter ego* issue was not litigated after Hazeltine had made its special appearance and while it had an opportunity to be heard, see *supra*, at 111, so the District Court evidently did not rely upon anything more than the stipulation as a basis for entering the injunction against Hazeltine as well as HRI. The record does not support the contention, implicit in Zenith's brief, that when Hazeltine appeared to contest jurisdiction it was found by the District Court to be "in active concert or participation" with HRI and that, by entering its special appearance, Hazeltine consented to be bound by such a finding. See generally Dobbs, The Validation of Void Judgments: The Bootstrap Principle (pts. 1 and 2), 53 Va. L. Rev. 1003, 1241 (1967).

II. The Foreign Patent Pools.

A. *The Treble-Damage Award.*

HRI's major points in the Court of Appeals were that no injury to Zenith's business during the damage period had been proved; that if Zenith had suffered injury, it resulted wholly or partly from conduct prior to May 22, 1959, and to this extent was barred by the statute of limitations and by Zenith's 1957 settlement of certain antitrust litigation against RCA, General Electric, and Western Electric, which had the effect of releasing HRI from all liability for pre-settlement acts of the foreign patent pools;[7] that the Hazeltine companies had not illegally conspired with foreign pools; and that the damage award was excessive. Passing the other issues pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period which resulted from pool activities either before or after the beginning of the damage period, and that the District Court's finding to the contrary was clearly erroneous.[8]

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[7] Although HRI and Hazeltine were not parties to this prior litigation and did not enter the settlement agreement, HRI urged that all joint tortfeasors, including HRI and Hazeltine, were released from liability for injuries flowing from the pre-settlement acts of the pools. The 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade; the embargoes in England and Australia were thought by the District Court to preclude any injury from acts of the English and Australian pools, and the embargoes were not lifted until well after the settlement was executed.

[8] The Court of Appeals did not disturb, nor do we, the findings of the District Court that HRI and Hazeltine conspired with the Canadian pool to deny patent licenses to companies seeking to export American-made goods to Canada. Accepting these findings, we have no doubt that the Sherman Act was violated. See, *e. g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 599

We have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent [9] by the Canadian pool's restraints upon imports of radio and television sets. On the other hand, we agree with the Court of Appeals that the District Court erred as to the English and Australian markets.

1. *The Canadian Pool.*

The findings of the District Court with respect to the operations of the Canadian pool may be briefly summarized. The Canadian patent pool, Canadian Radio Patents, Ltd. (CRPL), was formed in 1926 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Company, and

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(1951); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962). Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question. *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra.* Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443 (C. A. 2d Cir. 1945). Although patent rights are here involved, the same conclusions follow. See, for example, *United States* v. *Line Material Co.*, 333 U. S. 287, 305–315 (1948); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 196–197 (1963).

[9] Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* at 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143–144 (1968) (concurring opinion).

by Westinghouse through its Canadian subsidiary. The pool was made up largely of Canadian manufacturers, most of which were subsidiaries of American companies. The pool for many years had the exclusive right to sublicense the patents of its member companies and also those of Hazeltine and a number of other foreign concerns. About 5,000 patents were available to the pool for licensing, and only package licenses were granted, covering all patents in the pool and strictly limited to manufacture in Canada. No license to importers was available. The chief purpose of the pool was to protect the manufacturing members and licensees from competition by American and other foreign companies seeking to export their products into Canada.

CRPL's efforts to prevent importation of radio and television sets from the United States were highly organized and effective. Agents, investigators, and manufacturer and distributor trade associations systematically policed the market; warning notices and advertisements advised distributors, dealers, and even consumers against selling or using unlicensed equipment. Infringement suits or threats thereof were regularly and effectively employed to dissuade dealers from handling American-made sets.

For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful. Zenith then brought an antitrust suit against RCA, General Electric, and Western Electric.[10] This litigation was favorably settled, Zenith receiving, among other things, worldwide licenses on patents owned by the named defendants.

[10] Zenith's antitrust claim was asserted as a counterclaim in a patent infringement suit brought by RCA against Zenith and its subsidiary, the Rauland Corporation.

Armed with these and other licenses, Zenith in 1958 began exporting radio and television products to Canada. It was promptly informed by CRPL that to continue business in Canada, Zenith would be required to sign CRPL's standard license, which did not permit importation, and that to sell in Canada it must manufacture there. Zenith was notified at the time that it was infringing at least one of Hazeltine's patents which had been placed with CRPL for licensing in Canada. Soon after this demand by CRPL, HRI began its infringement suit against Zenith.

Some of the trial court's findings describing the operations of the Canadian pool and its "drastic" impact upon Zenith's foreign commerce did not date the events or state whether they had occurred before or after May 22, 1959. The damage award was confined to injuries sustained during the statutory period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period. Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share.[11] Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages

[11] The computation of damages, prepared by Zenith's experts and accepted by the District Court, see 239 F. Supp., at 76, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales.

awarded, therefore, necessarily resulted from pre-damage period conduct.[12]

The Court of Appeals reversed the District Court because it considered the evidence insufficient to prove the fact of any damage to Zenith after May 22, 1959. Having put aside HRI's statute of limitations defense, belatedly raised in the District Court and pressed in the Court of Appeals,[13] the import of the court's decision

[12] On November 22, 1965, during the further proceedings held to consider damages for England and Australia, Zenith's executive vice-president and treasurer, Kaplan, testified:

"In Canada, our assumption was that we commenced the period starting June 1, 1959 as if we had a full blown organization, and had enjoyed the benefits of doing business there for years prior to that date."

[13] HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for "leave to file" defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. The thrust of the former was primarily that the findings as to Canada had erroneously included damages resulting from conduct occurring prior to May 22, 1959. The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under Fed. Rule Civ. Proc. 12 (h), as urged by Zenith in both the District Court and the Court of Appeals.

Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring "during the 4-year statutory damage period." 239 F. Supp., at 76. The Court of Appeals, although not purporting to pass on the statute of limitations defense, referred to the "four year damage period" and identified it as "[f]our years prior to the May 22, 1963, filing date of Zenith's counterclaim. 15 U. S. C. Sec. 15b." 388 F. 2d, at 35 and n. 4. The parties have not argued the matter here, and we make no further effort to penetrate the confusion surrounding this issue or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted.

was that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date. The Court of Appeals' overriding judgment—as it had to be if its no-injury rationale were to meet claims of damage period injury from pre-damage period conduct—was that Zenith would have done no more business in Canada after May 22, 1959, had the patent pool never operated in that country.

The Court of Appeals was clearly in error. The evidence was quite sufficient to sustain a finding that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its co-defendants. And even in 1958, when Zenith undertook in earnest to establish its distribution system in Canada and to market its merchandise, Zenith was met with further pool advertisements threatening action against imported goods and further notifications, continuing past May 22, 1959, that its products were infringing pool patents and that no license was available unless Zenith manufactured in Canada.

This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally

be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed.

We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. See, *e. g., Local 167* v. *United States*, 291 U. S. 293, 297–298 (1934); *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952). HRI frankly conceded the continuation of the pool before the District Court,[14] and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada.

On May 12, 1959, the pool manager conferred with Zenith's vice president, informing him that Zenith was infringing pool patents and would require a license,

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[14] On April 1, 1965, during the further proceedings held by the District Court before judgment, counsel for HRI stated:

"Now, what [counsel for Zenith] is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents—that characterized necessarily as he characterizes them, but that these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

HRI does contend, however, that the ties between the Canadian pool and the Hazeltine companies were broken in December 1965, when Hazeltine secured an early termination of its licensing agreement with CRPL. See n. 25, *infra*.

but that licenses were granted only for local manufacture. This was followed on June 5, 1959, by a letter stating without reservation that Zenith receivers were infringing, and enclosing the pool's standard license form. This was nothing more nor less than a demand during the damage period that Zenith either manufacture in Canada and take the standard package license or cease its activities in that country.[15] There is no evidence that the pool ever retreated from that position during the next four years.

Zenith thus continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws. This deprivation in itself necessarily had an impact on Zenith and constituted an injury to its business. We find singularly unpersuasive the argument that Zenith was as well off without a license as with one. This is little more than an assertion that pool licenses, from which CRPL and its participants enjoyed substantial income, were without value. Without the license, doing business in Canada obviously involved weighty risks for Zenith itself, besides requiring it to convince the trade that it could legally and effectively do business without clearance from CRPL.[16]

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[15] That Zenith failed to make a formal request for a CRPL license during the damage period can properly be attributed to Zenith's recognition that such a request would have been futile. The pool had made its position entirely clear, and under these circumstances the absence of a formal request is not fatal to Zenith's case. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699–702 (1962); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 487, n. 5 (1968).

[16] In 1960, the Report of the Royal Commission on Patents, Copyright and Industrial Designs was published. This Report described the magnitude of the risk taken by Zenith and its distributors in selling imported products in Canada:

"The portfolio in respect of which CRPL had the right to grant licences consisted of 5,000 patents, and in the absence of a licence

Of course, Zenith determined to take these risks, serious as they were. Although HRI brought the instant litigation claiming infringement of an HRI domestic patent, the foreign counterpart of which had been made available to the Canadian pool by Hazeltine, Zenith persevered in its Canadian efforts. The claim is now pressed, and the Court of Appeals held, that the pool bothered neither Zenith nor its distributors after mid-1959 and that Zenith ran the gantlet so successfully that not having a license made no difference whatsoever.

It is true that the record discloses no specific instance of subsequent infringement suits or threats against Zenith's existing or potential distributors or dealers. But there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise.[17] More significant, the fair import of the testi-

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from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver.

"CRPL indicated that it does not grant a licence to any importer of radio or television receivers . . . . It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission.

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . . ."

[17] This letter, brought to Zenith's attention by an ex-Zenith dealer, warned the Motorola dealer that his importation of American-made television sets and FM radios probably infringed pool patents. The dealer not only was cautioned that CRPL remained willing to litigate infringements, describing two recent and successful suits, but also was reminded of CRPL's policy against licensing imports:

"In closing, I wish to inform you that we would be most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents."

mony by Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing an effective distribution system throughout Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Canadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do,[18] but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge

[18] HRI urges that the trial testimony as to Canada of each of two Zenith officers, Wright and Kaplan, was inconsistent with his own testimony on recall, inconsistent with the testimony of the other, and inconsistent with documentary evidence, and that we should therefore disregard their testimony. It is true that the trial judge's views as to credibility are not completely impervious, but Rule 52 (a) admonishes due regard for the trial court's opportunity to assess the credibility of witnesses. The Court of Appeals clearly took into account this evidence, and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence. See *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 37–38 (1918); *Walling* v. *General Industries Co.*, 330 U. S. 545, 550 (1947); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 609–612 (1950); *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952); *Orvis* v. *Higgins*, 180 F. 2d 537, 539–540 (C. A. 2d Cir.), cert. denied, 340 U. S. 810 (1950); *Ruth* v. *Utah Construction & Mining Co.*, 344 F. 2d 952 (C. A. 10th Cir. 1965). HRI relies heavily in this respect on Zenith's annual reports for the years 1957–1962, but aside from the fact that these reports, except for 1962, were never admitted into evidence, we find them quite insufficient to undermine the credibility of Wright and Kaplan.

and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946), and other cases dealing with the standard of proof in treble-damage actions.

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52 (a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 495–496 (1950); *Commissioner* v. *Duberstein*, 363 U. S. 278, 289–291 (1960).

Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage

to the plaintiffs." *Bigelow* v. *RKO Pictures, Inc., supra,* at 264. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 377–379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, 561–566 (1931).

In *Bigelow,* a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theater granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages. Although the factfinder is not entitled to base a judgment on speculation or guesswork,

> "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co.* v. *Paterson Co., supra,* 561–4; *Eastman Kodak Co.* v. *Southern Photo Co., supra,* 377–9. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U. S., at 264–265.

Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which

it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696–701 (1962).

2. *The English Pool.*

Hazeltine patents were made available to the English pool in 1930. The pool issued only package licenses, restricted to local manufacture. Although pool radio patents had expired prior to the beginning of the damage period, the trial court found, and we assume, that the pool held television patents which would not be licensed for television sets made in the United States.[19] Zenith was interested in the English market and made exclusive arrangements with one distributor desiring to handle its merchandise. At no time during or before the damage period, however, did Zenith make available or offer for sale a substantial number of television sets suitable for the English market or make any other serious efforts to

[19] Wright testified that in mid-1955 a representative of the English pool had confirmed his understanding that "the policy of the Pool . . . required that [radio and television] sets be made in England, and that nothing would be licensed if it was imported from abroad." Wright further testified that the pool representative "saw no possibility" that this restrictive policy would be changed in the future. Subsequently, during its dealings with its English radio distributor, Zenith was "given to understand that television was just out of the question."

enter that market. It attained no appreciable position in the English television market.

Having initially found the patent pool responsible over the years for Zenith's failure to participate in the English market, the trial court, after further proceedings, held that a government embargo, not the patent pool, was the sole reason for Zenith's not entering the English market prior to the beginning of the damage period in 1959; until then, the District Court found, the pool "[was] not called upon to exercise the type of conduct that [it] exercised in Canada." It did not, however, retreat from its conclusion that restraints imposed by the pool had foreclosed Zenith during the damage period.[20] In this respect we agree with the Court of Appeals that the trial court clearly erred. Based on our own examination of the record, we are convinced that even with the ending of the embargo in mid-1959, Zenith faced other obstacles which effectively discouraged its entry into the English market and for which the pool was not responsible.

Positing that Zenith could not get a license from the English pool and that it did not enter the British market before or during the damage period, the issue is whether, once the embargo was lifted, Zenith wanted and intended to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its "business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other

[20] Because the embargo precluded any recovery by Zenith for the first year of the damage period, the trial court modified its initial measure of damages to reflect the time it would have taken Zenith, starting with the removal of the embargo, to build up its market share. See n. 1, *supra*.

factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4.[21]

Zenith was interested in the English market; this much is clear. But its standard domestic television set was manufactured to operate on 525- and 625-line-per-second scanning signals, whereas the 405-line signal was standard in England until after the damage period. Similarly, while FM transmission was utilized in the United States for the audio portion, AM signals were used in England. Zenith's regular product thus was not salable in the English market. To succeed at all, Zenith had either to produce a differently equipped set or to provide for the mass conversion of its standard receivers. Unquestionably, the company had the facilities and the ability to follow either course. But it is equally clear that it pursued neither.[22] A change in the standard British broadcast to include a 625-line signal was under

[21] See *American Banana Co.* v. *United Fruit Co.* 166 F. 261, 264 (C. A. 2d Cir. 1908), affirmed without specific reference to this issue, 213 U. S. 347 (1909); *Stearns* v. *Tinker & Rasor*, 252 F. 2d 589, 606 (C. A. 9th Cir. 1958); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395–396 (C. A. 6th Cir. 1962), cert. denied, 372 U. S. 907 (1963). Cf. *Pennsylvania Sugar Rfg. Co.* v. *American Sugar Rfg. Co.*, 166 F. 254, 260 (C. A. 2d Cir. 1908).

[22] During trial, Wright and Kaplan testified that adjustments could be made by Zenith's English distributor in his shop to adapt Zenith television sets to the English transmission system. However, the fair import of their testimony, both during trial and in November 1965 on recall, was that conversion of Zenith sets to the English system, whether done before shipment to England or in the distributor's shop, had in fact been carried out only occasionally in the past and was of questionable utility on a commercial basis. Wright and Kaplan stated that Zenith could have manufactured a television set suitable for English use without appreciably more difficulty than Zenith faced in producing a new model for the American market, but the record does not indicate that Zenith took any steps in this direction before the end of the damage period, except in anticipation of the British changeover to the 625-line-per-second transmission system.

consideration, even imminent, during the damage period. Zenith's merchandise would in any event have sold at prices substantially higher than those prevailing in the English market; tariffs and freight costs tended to widen the differential. Producing a new set for the English market, or modifying existent models on a large-scale basis, would have involved substantial costs.

Based on the evidence before us, including the correspondence between Zenith and its British representative, we think the Court of Appeals correctly rejected the inference that "Zenith intended to and was prepared to enter the English television market during the damage period," and correctly concluded that Zenith was in fact "waiting for a change in English standards to a 625-line system." 388 F. 2d, at 37. It clearly emerges from the evidence that Zenith had every intention to promote the sale of its television sets if and when the signal change occurred. Given that event, neither the absence of a pool license nor pool threats against it or its customers would have deterred Zenith from a major effort to penetrate the British market. Why the existence of the pool, which as far as the record shows was quiescent during the damage period, should be credited with the power to discourage Zenith's entry before the signal change but not after is difficult to grasp. But the question at hand is not whether, if Zenith had decided to enter the market, the pool would have been a deterrent and inflicted damage. Rather, it is whether Zenith was in fact constrained by the pool to stay out of England during the damage period or whether Zenith's own business calculus led it to await more favorable conditions. As we have said, the latter is the only permissible inference from this record.

3. *The Australian Pool.*

The Australian patent pool, which had exclusive rights to license Hazeltine patents, also granted licenses only

for local manufacture. Had HRI and Hazeltine's conspiracy with the Australian pool effectively kept Zenith from that market, a compensable violation of the antitrust laws unquestionably would have occurred. But the findings of the District Court are wholly silent as to how the Australian pool had any impact on Zenith's business. An officer of Zenith revealed that Zenith had exported no products to Australia since the 1920's or early 1930's. Zenith had not requested a pool license during the 20-year period preceding the trial. A government embargo was found by the District Court to have foreclosed Zenith's American-made merchandise until well into the damage period. High tariffs and shipping costs were additional barriers, as well as the prospect of vigorous competition. Nothing in the record before us would permit the inference that Zenith either intended or was prepared to enter the Australian market during the damage period. The Court of Appeals was correct in reversing the District Court's award of damages with respect to the Australian market.

B. *The Injunction.*

In setting aside the District Court's grant of injunctive relief against continued participation by HRI and Hazeltine in any patent pool or similar association restricting Zenith's export trade,[23] the Court of Appeals stated, without more:

> "It follows from our conclusion with respect to the foreign patent pools that injunctive relief against

[23] Paragraph C of the District Court's injunction prohibits HRI from

"Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market."

'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U. S. C. Sec. 26. Paragraph C of the injunction granted must be stricken." 388 F. 2d, at 39.

The evident premise for striking Paragraph C was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U. S. C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury.[24] That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, see *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 54–55 (1927); he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, *supra*, at 54; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to pro-

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[24] Section 16 provides:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, *against threatened loss or damage by a violation of the antitrust laws*, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ." (Emphasis added.) 15 U. S. C. § 26.

vide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g., United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944). Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect." *Id.*, at 330.

Judged by the proper standard, the record before us warranted the injunction with respect to Canada. The findings of the District Court were that HRI and CRPL were conspiring to exclude Zenith and others from the Canadian market; there was nothing indicating that this clear violation of the antitrust laws had terminated or that the threat to Zenith inherent in the conduct would cease in the foreseeable future. Neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct would cease with the judgment negated the threat to Zenith's foreign trade.[25]

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[25] HRI informs us that Hazeltine, having obtained an early termination of its licensing agreement with CRPL, is now prepared to license any one or more of its Canadian patents "with no restrictions on imports." Since Hazeltine's abandonment of its participation in the Canadian pool occurred only after—and, apparently, in response to—the District Court's judgment and decree, we cannot agree with the suggestion that injunctive relief as to Canada has been rendered unnecessary and inappropriate. See *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 202–203 (1968). Although HRI is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, see,

That threat was too clear for argument, and injunctive relief against HRI with respect to the Canadian market was wholly proper.

We also reinstate the injunction entered by the District Court insofar as it more broadly barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign market. In exercising its equitable jurisdiction, "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941). See also *United States* v. *National Lead Co.*, 332 U. S. 319, 328–335 and n. 4 (1947). Given the findings that HRI was conspiring with the Canadian pool, its purpose to exclude Zenith from Canada and its violation of the Sherman Act were clearly established. Its propensity for arrangements of this sort was also indicated by the findings revealing its participation in similar pools operating in England and Australia.[26] Zenith, a company interested in expanding its foreign commerce and having suffered at the hands of HRI and its coconspirators in the Canadian market, was entitled to injunctive relief against like conduct by HRI in other

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e. g., United States v. *W. T. Grant Co.*, 345 U. S. 629, 633–636 (1953), we are not willing at this time to undertake a reappraisal of the injunction in light of post-trial developments.

[26] Having not disturbed the District Court's findings that HRI and Hazeltine were conspiring with English and Australian patent pools which refused to license imports, the Court of Appeals in any event should have sustained the injunction with respect to the English and Australian markets. These findings, together with Zenith's demonstrated intent to expand its export business, were sufficient foundation for the conclusion that continued participation by HRI and Hazeltine in the English and Australian pools posed a significant threat of loss or damage to Zenith's business.

world markets. We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by § 16, should not respond to the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *NLRB* v. *Express Publishing Co., supra,* at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court, *e. g., New York, N. H. & H. R. Co.* v. *ICC,* 200 U. S. 361, 401 (1906), "[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co.* v. *United States,* 332 U. S. 392, 400 (1947). This is particularly true in treble-damage cases, which are brought for private ends, but which also serve the public interest in that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *Id.,* at 401.

III. The Patent-Misuse Issue.

Since the District Court's treble damage award for patent misuse was affirmed by the Court of Appeals, and HRI has not challenged that award in this Court, the only misuse issue we need consider at length is whether the Court of Appeals was correct in striking the last clause from Paragraph A of the injunction,[27] which enjoined HRI from

> "A. Conditioning directly or indirectly the grant of a license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any

[27] The District Court's injunction also included a paragraph barring HRI from continuing to coerce acceptance of its package license through the mechanism of offering a much lower royalty rate for

domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" (Emphasis added.)

This paragraph of the injunction was directed at HRI's policy of insisting upon acceptance of its standard five-year package license agreement, covering the 500-odd patents within its domestic licensing portfolio and reserving royalties on the licensee's total radio and television sales, irrespective of whether the licensed patents were actually used in the products manufactured.[28]

In striking the last clause of Paragraph A the Court of Appeals, in effect, made two determinations. First, under its view of *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), conditioning the grant of a patent license upon payment of royalties on unpatented products was not misuse of the patent. Second, since such conduct did not constitute

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those licensees who take a license on the entire package of patents rather than a license on merely a few of them. Paragraph B enjoined HRI from

"Conditioning directly or indirectly the grant of any license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any domestic patent upon the payment of the same or greater royalty rate than the rate at which licenses have been granted or offered to others under a group of domestic patents which includes said patent."

The Court of Appeals modified this paragraph in certain respects, 388 F. 2d, at 39, but we do not disturb these modifications.

[28] The District Court concluded:

"Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products." 239 F. Supp., at 77.

patent misuse, neither could it be violative of the antitrust laws within the meaning of § 16 of the Clayton Act, under which Zenith had sought and the District Court had granted the injunction. With respect to the first determination, we reverse the Court of Appeals. We hold that conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse.

The trial court's injunction does not purport to prevent the parties from serving their mutual convenience by basing royalties on the sale of all radios and television sets, irrespective of the use of HRI's inventions. The injunction reaches only situations where the patentee directly or indirectly "conditions" his license upon the payment of royalties on unpatented products—that is, where the patentee refuses to license on any other basis and leaves the licensee with the choice between a license so providing and no license at all. Also, the injunction takes effect only if the license is conditioned upon the payment of royalties "on" merchandise not covered by the patent—where the express provisions of the license or their necessary effect is to employ the patent monopoly to collect royalties, not for the use of the licensed invention, but for using, making, or selling an article not within the reach of the patent.

A patentee has the exclusive right to manufacture, use, and sell his invention. See, *e. g., Bement* v. *National Harrow Co.*, 186 U. S. 70, 88–89 (1902). The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. See, *e. g., Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405 (1908); *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24 (1923). The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention. See,

e. g., Waterman v. *Mackenzie,* 138 U. S. 252, 255 (1891). But there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. *E. g., Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 455–459 (1940); *International Salt Co.* v. *United States,* 332 U. S. 392, 395–396 (1947). His right to set the price for a license does not extend so far, whatever privilege he has "to exact royalties as high as he can negotiate." *Brulotte* v. *Thys Co.,* 379 U. S. 29, 33 (1964). And just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

In *Brulotte* v. *Thys Co., supra,* the patentee licensed the use of a patented machine, the license providing for the payment of a royalty for using the invention after, as well as before, the expiration date of the patent. Recognizing that the patentee could lawfully charge a royalty for practicing a patented invention prior to its expiration date and that the payment of this royalty could be postponed beyond that time, we noted that the post-expiration royalties were not for prior use but for current use, and were nothing less than an effort by the patentee to extend the term of his monopoly beyond that granted by law. *Brulotte* thus articulated in a particularized context the principle that a patentee may

not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by the Government.

Automatic Radio is not to the contrary; it is not authority for the proposition that patentees have *carte blanche* authority to condition the grant of patent licenses upon the payment of royalties on unpatented articles. In that case, Automatic Radio acquired the privilege of using all present and future HRI patents by promising to pay a percentage royalty based on the selling price of its radio receivers, with a minimum royalty of $10,000 per year. HRI sued for the minimum royalty and other sums. Automatic Radio asserted patent misuse in that the agreement extracted royalties whether or not any of the patents were in any way used in Automatic Radio receivers. The District Court and the Court of Appeals approved the agreement as a convenient method designed by the parties to avoid determining whether each radio receiver embodied an HRI patent. The percentage royalty was deemed an acceptable alternative to a lump-sum payment for the privilege to use the patents. This Court affirmed.

Finding the tie-in cases such as *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), inapposite, and distinguishing *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), as involving a conspiracy between patentee and licensees to eliminate competition, the Court considered reasonable the "payment of royalties according to an agreed percentage of the licensee's sales," since "[s]ound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement." 339 U. S., at 834. It found nothing "inherent" in such a royalty provision which would extend the patent monopoly. Finally, the holding by the Court was stated to be that in licensing the use

of patents "it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." *Ibid.*

Nothing in the foregoing is inconsistent with the District Court's injunction against conditioning a license upon the payment of royalties on unpatented products or with the principle that patent leverage may not be employed to collect royalties for producing merchandise not employing the patented invention. The Court's opinion in *Automatic Radio* did not deal with the license negotiations which spawned the royalty formula at issue and did not indicate that HRI used its patent leverage to coerce a promise to pay royalties on radios not practicing the learning of the patent. No such inference follows from a mere license provision measuring royalties by the licensee's total sales even if, as things work out, only some or none of the merchandise employs the patented idea or process, or even if it was foreseeable that some undetermined portion would not contain the invention. It could easily be, as the Court indicated in *Automatic Radio*, that the licensee as well as the patentee would find it more convenient and efficient from several standpoints to base royalties on total sales than to face the burden of figuring royalties based on actual use.[29] If convenience of the parties rather than patent power dictates the total-sales royalty provision, there are no misuse of the patents and no forbidden conditions attached to the license.

The Court also said in *Automatic Radio* that if the licensee bargains for the privilege of using the patent in all of his products and agrees to a lump sum or a percentage-of-total-sales royalty, he cannot escape pay-

[29] The record and oral argument in *Automatic Radio* disclose no basis for the conclusion that Automatic Radio was forced into accepting the total-sales royalty rate by HRI's use of its patent leverage.

ment on this basis by demonstrating that he is no longer using the invention disclosed by the patent. We neither disagree nor think such transactions are barred by the trial court's injunction. If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them," 339 U. S., at 834, he cannot complain that he must pay royalties if he chooses to use none of them. He could not then charge that the patentee had refused to license except on the basis of a total-sales royalty.

But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent or that for some lines of his merchandise he has no need or desire to purchase the privileges of the patent. In such event, not only would royalties be collected on unpatented merchandise, but the obligation to pay for nonuse would clearly have its source in the leverage of the patent.

We also think patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but also for producing products which do not employ his discoveries at all.

Of course, a licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's

expenses in dealing with him. He cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent. If the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license—enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all. But we discern no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

Although we have concluded that *Automatic Radio* does not foreclose the injunction entered by the District Court, it does not follow that the injunction was otherwise proper. Whether the trial court correctly determined that HRI was conditioning the grant of patent licenses upon the payment of royalties on unpatented products has not yet been determined by the Court of Appeals. And if there was such patent misuse, it does not necessarily follow that the misuse embodies the ingredients of a violation of either § 1 or § 2 of the Sherman Act, or that Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. See, *e. g.*, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 490 (1942); *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, 641 (1947); *Laitram Corp.* v. *King Crab, Inc.*, 245 F. Supp. 1019 (D. C. Alaska 1965). See also Report of the Attorney General's National Committee to Study the Antitrust Laws 254 (1955); R. Nordhaus & E. Jurow, Patent-Antitrust Law 122–123 (1961); Frost, Patent Misuse As A Per Se Antitrust Violation, in Conference on the Antitrust Laws and the Attorney General's Committee Report 113–123 (J. Rahl & E. Zaidins ed., 1955).

Cf. Staff of Antitrust Subcommittee of House Committee on the Judiciary, 84th Cong., 2d Sess., Antitrust Problems in the Exploitation of Patents 23 (Comm. Print. 1956); Schueller, The New Antitrust Illegality Per Se: Forestalling and Patent Misuse, 50 Col. L. Rev. 170, 184–200 (1950). Whether the findings and the evidence are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify the injunction issued by the District Court has not been considered by the Court of Appeals, and we leave the matter to be dealt with by that court in the first instance.

Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. However, I do not join Part III, in which the Court holds that a patent license provision which measures royalties by a percentage of the licensee's total sales is lawful if included for the "convenience" of both parties but unlawful if "insisted upon" by the patentee.

My first difficulty with this part of the opinion is that its test for validity of such royalty provisions is likely to prove exceedingly difficult to apply and consequently is apt to engender uncertainty in this area of business dealing, where certainty in the law is particularly desirable. In practice, it often will be very hard to tell whether a license provision was included at the instance of both parties or only at the will of the licensor. District courts will have the unenviable task of deciding whether the course of negotiations establishes "insistence" upon the suspect provision. Because of the uncertainty in-

herent in such determinations, parties to existing and future licenses will have little assurance that their agreements will be enforced. And it may be predicted that after today's decision the licensor will be careful to embellish the negotiations with an alternative proposal, making the court's unravelling of the situation that much more difficult.

Such considerations lead me to the view that any rule which causes the validity of percentage-of-sales royalty provisions to depend upon subsequent judicial examination of the parties' negotiations will disserve rather than further the interests of all concerned. Hence, I think that the Court has fallen short in failing to address itself to the question whether employment of such royalty provisions should invariably amount to patent misuse.[1]

My second difficulty with this part of the Court's opinion is that in reality it overrules an aspect of a prior decision of this Court, *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950), without offering more than a shadow of a reason in law or economics for departing from that earlier ruling. Despite the Court's efforts to distinguish *Automatic Radio*, it cannot be denied that the Court there sustained a Hazeltine patent license of precisely the same tenor as the one involved here, on the ground that "[t]his royalty provision does not create another monopoly; it creates no restraint of competition beyond the legitimate grant of the patent." 339 U. S., at 833.

In finding significance for present purposes in some of the qualifying language in *Automatic Radio*, I believe that the Court today has misconstrued that opinion. A reading of the opinion as a whole satisfies me that the

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[1] I find it unnecessary to consider the further question whether inclusion of such a provision should be held to violate the antitrust laws.

Automatic Radio Court did not consider it relevant whether Hazeltine Research had "insisted" upon inclusion of the disputed provision, and that in emphasizing that the royalty terms had no "inherent" tendency to extend the patent monopoly and were not a *"per se"* misuse of patents, the Court was simply endeavoring to distinguish prior decisions in which patent misuse was found when the patent monopoly had been employed to "create *another* monopoly or restraint of competition." 339 U. S., at 832.[2] (Emphasis added.) Until now no subsequent decision has in any way impaired this aspect of *Automatic Radio*.[3]

Since the Court's decision finds little if any support in the prior case law, one would expect from the Court an exposition of economic reasons for doing away with the *Automatic Radio* doctrine. However, the nearest thing to an economic rationale is the Court's declaration that:

> "just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings." *Ante*, at 136.

The Court then finds in the patentee a heretofore nonexistent right to "insist upon paying only for use, and not on the basis of total sales . . . ." *Ante*, at 139.

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[2] The *Automatic Radio* Court explicitly distinguished a number of cases of that kind, including *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), and *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944). See 339 U. S., at 832–833.

[3] *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), involved a different question: whether a royalty based solely upon use of the invention could be collected for use occurring after the patent's expiration.

What the Court does not undertake to explain is *how* insistence upon a percentage-of-sales royalty enables a patentee to obtain an economic "benefit not attributable to use of the patent's teachings," thereby involving himself in patent misuse. For it must be remembered that all the patentee has to license is the right to use his patent. It is solely for that right that a percentage-of-sales royalty is paid, and it is not apparent from the Court's opinion why this method of determining the *amount* of the royalty should be any less permissible than the other alternatives, whether or not it is "insisted" upon by the patentee.

One possible explanation for the Court's result, which seems especially likely in view of the Court's exception for cases where the provision was included for the "convenience" of both parties, is a desire to protect licensees against overreaching. But the Court does not cite, and the parties have not presented, any evidence that licensees as a class need such protection.[4] Moreover, the Court does not explain why a royalty based simply upon use could not be equally overreaching.

Another possible justification for the Court's result might be that a royalty based directly upon use of the patent will tend to spur the licensee to "invent around" the patent or otherwise acquire a substitute which costs less, while a percentage-of-sales royalty can have no such effect because of the licensee's knowledge that he must pay the royalty regardless of actual patent use. No hint of such a rationale appears in the Court's opinion. Moreover, under this theory a percentage-of-sales royalty would be objectionable largely because of resulting damage to the rest of the economy, through less efficient allocation of resources, rather than because of possible harm to the licensee. Hence, the theory might not

[4] Cf. *American Photocopy Equip. Co.* v. *Rovico*, 359 F. 2d 745 (1966).

admit of the Court's exception for provisions included for the "convenience" of both parties.

Because of its failure to explain the reasons for the result reached in Part III, the Court's opinion is of little assistance in answering the question which I consider to be the crux of this part of the case: whether percentage-of-sales royalty provisions should be held without exception to constitute patent misuse. A recent economic analysis [5] argues that such provisions may have two undesirable consequences. First, as has already been noted, employment of such provisions may tend to reduce the licensee's incentive to substitute other, cheaper "inputs" for the patented item in producing an unpatented end-product. Failure of the licensee to substitute will, it is said, cause the price of the end-product to be higher and its output lower than would be the case if substitution had occurred.[6] Second, it is suggested that under certain conditions a percentage-of-sales royalty arrangement may enable the patentee to garner for himself elements of profit, above the norm for the industry or economy, which are properly attributable not to the licensee's use of the patent but to other factors which cause the licensee's situation to differ from one of "perfect competition," and that this cannot occur when royalties are based upon use.[7]

If accepted, this economic analysis would indicate that percentage-of-sales royalties should be entirely outlawed. However, so far as I have been able to find, there has as yet been little discussion of these matters either by lawyers or by economists. And I find scant illumination on this score in the briefs and arguments of the parties in this case. The Court has pointed out both today and in

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[5] Baxter, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L. J. 267 (1966).

[6] See *id.*, at 299–301, 302–306.

[7] See *id.*, at 300–301, 302–306, 331–332.

Automatic Radio that percentage-of-sales royalties may be administratively advantageous for both patentee and licensee. In these circumstances, confronted, as I believe we are, with the choice of holding such royalty provisions either valid or invalid across the board, I would, as an individual member of the Court, adhere for the present to the rule of *Automatic Radio*.

FRANK *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 200. Argued December 12, 1968.—Decided May 19, 1969.

Petitioner was charged with criminal contempt for violating an injunction. After unsuccessfully demanding a jury trial, he was tried and adjudged guilty by the District Court, which suspended imposition of sentence and placed him on probation for three years. The Court of Appeals affirmed. *Held:*

1. Petty offenses may be tried without a jury. In determining whether an offense can be classified as "petty" the most relevant criterion is the severity of the penalty authorized, and where no maximum penalty is authorized, the severity of the penalty actually imposed. Pp. 148–149.

2. Criminal contempt sentences of up to six months may be constitutionally imposed without a jury trial. See *Cheff* v. *Schnackenberg*, 384 U. S. 373. P. 150.

3. Congress made the federal probation statute (18 U. S. C. § 3651), under which most offenders may be placed on probation for up to five years, applicable to petty as well as more serious offenses and thus petty offenses may be tried by any combination of penalties authorized by 18 U. S. C. § 1 and § 3651. P. 150.

4. Since petitioner's sentence was within the limits of the congressional definition of petty offense, he was not entitled to a jury trial. P. 152.

384 F. 2d 276, affirmed.

John B. Ogden argued the cause and filed briefs for petitioner.

Peter L. Strauss argued the cause for the United States. With him on the brief were *Solicitor General Griswold*, *Assistant Attorney General Vinson*, *Beatrice Rosenberg*, and *Edward Fenig*.

Frank S. Hogan, *pro se*, and *Michael R. Juviler* filed a brief for the District Attorney of New York County as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was charged with criminal contempt of the United States District Court for the Western District of Oklahoma. The charge resulted from his violation of an injunction issued by that court at the request of the Securities and Exchange Commission. The injunction restrained petitioner from using interstate facilities in the sale of certain oil interests without having filed a registration statement with the Commission. Petitioner's demand for a jury trial was denied. He was convicted, and the court suspended imposition of sentence and placed him on probation for three years. The Court of Appeals affirmed. *Frank* v. *United States*, 384 F. 2d 276 (C. A. 10th Cir. 1967). We granted certiorari, 392 U. S. 925 (1968), to determine whether petitioner was entitled to a jury trial. We conclude that he was not.

The Sixth Amendment to the Constitution gives defendants a right to a trial by jury in "all criminal prosecutions." However, it has long been the rule that so-called "petty" offenses may be tried without a jury. See, *e. g.*, *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). For purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses. The defendant is entitled to a jury trial unless the particular offense can be classified as "petty." *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968); *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966).

In determining whether a particular offense can be classified as "petty," this Court has sought objective indications of the seriousness with which society regards the offense. *District of Columbia* v. *Clawans*, *supra*, at 628. The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission. Thus, in *Clawans* this Court held that

a jury trial was not required in a prosecution for engaging in a certain business without a license, an offense carrying a maximum sentence of 90 days. Recently, we held that a jury trial was required in a state prosecution for simple battery, an offense carrying a possible prison sentence of two years. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense. See *Duncan* v. *Louisiana*, *supra*, at 162, n. 35. But a person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal. Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as "serious" or "petty." 18 U. S. C. §§ 401, 402.[1] Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.[2] See, *e. g.*, *Cheff* v.

[1] Congress has provided for a jury trial in certain cases of criminal contempt. See, *e. g.*, 18 U. S. C. §§ 402, 3691, 3692. Section 3691 provides for a jury trial in contempts involving willful disobedience of court orders where the "act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state . . . ." The present case falls within an exception to that rule for cases involving disobedience of any court order "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

[2] If the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant criterion. See *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968).

Schnackenberg, supra. Thus, this Court has held that sentences for criminal contempt of up to six months may constitutionally be imposed without a jury trial. *Ibid.*[3]

The Government concedes that a jury trial would have been necessary in the present case if petitioner had received a sentence in excess of six months. Indeed, the Government concedes that petitioner may be sentenced to no more than six months if he violates the terms of his probation.[4] However, the Government argues that petitioner's actual penalty is one which may be imposed upon those convicted of otherwise petty offenses, and, thus, that a jury trial was not required in the present case. We agree.

Numerous federal and state statutory schemes allow significant periods of probation to be imposed for otherwise petty offenses. For example, under federal law, most offenders may be placed on probation for up to five years in lieu of or, in certain cases, in addition to a term of imprisonment. See 18 U. S. C. § 3651. Congress, in making the probation statute applicable to "any offense not punishable by death or life imprisonment," clearly made it apply to petty, as well as more serious, offenses. In so doing, it did not indicate that the additional penalty of a term of probation was to place otherwise petty offenses in the "serious" category. In other words, Congress decided that petty offenses may be punished by any combination of penalties authorized by 18 U. S. C. § 1 and 18 U. S. C. § 3651. Therefore,

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[3] The Court in *Cheff* relied on 18 U. S. C. § 1, which defines a petty offense as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . ."

[4] If imposition of sentence is suspended, the court may upon revocation of probation "impose any sentence which might originally have been imposed." 18 U. S. C. § 3653. Under *Cheff*, that sentence would be limited to six months' imprisonment.

the maximum penalty authorized in petty offense cases is not simply six months' imprisonment and a $500 fine. A petty offender may be placed on probation for up to five years and, if the terms of probation are violated, he may then be imprisoned for six months. 18 U. S. C. § 3653.

In *Cheff*, this Court undertook to categorize criminal contempts for purposes of the right to trial by jury. In the exercise of its supervisory power over the lower federal courts, the Court decided by analogy to 18 U. S. C. § 1 that penalties not exceeding those authorized for petty offenses could be imposed in criminal contempt cases without affording the right to a jury trial.[5] We think the analogy used in *Cheff* should apply equally here. Penalties presently authorized by Congress for petty offenses, including a term on probation, may be imposed in federal criminal contempt cases without a jury trial. Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself.[6] In noncontempt cases, Congress has not viewed the possibility of five years' proba-

[5] "[W]e are constrained to view the [contempt] proceedings here as equivalent to a procedure to prosecute a petty offense, which under our decisions does not require a jury trial. . . . According to 18 U. S. C. § 1 (1964 ed.), '[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months' is a 'petty offense.' Since Cheff received a sentence of six months' imprisonment . . . , and since the nature of criminal contempt, an offense *sui generis*, does not, of itself, warrant treatment otherwise . . . , Cheff's offense can be treated only as 'petty' in the eyes of the statute and our prior decisions. We conclude therefore that Cheff was properly convicted without a jury." *Cheff* v. *Schnackenberg*, *supra*, at 379–380.

[6] Petitioner is required to make monthly reports to his probation officer, associate only with law-abiding persons, maintain reasonable hours, work regularly, report all job changes to his probation officer, and not leave the probation district without the permission of his probation officer.

tion as onerous enough to make an otherwise petty offense "serious." This Court is ill-equipped to make a contrary determination for contempt cases. As this Court said in *Clawans*, "[d]oubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." 300 U. S., at 628.

Petitioner's sentence is within the limits of the congressional definition of petty offenses. Accordingly, it was not error to deny him a jury trial.

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, adhering to the views expressed in the dissenting opinion of MR. JUSTICE HARLAN in *Bloom* v. *Illinois*, 391 U. S. 194, 215, and in Part I of MR. JUSTICE HARLAN's separate opinion in *Cheff* v. *Schnackenberg*, 384 U. S. 373, 380, but considering themselves bound by the decisions of the Court in those cases, join in the above opinion on these premises.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court's decision today marks an unfortunate retreat from our recent decisions enforcing the Constitution's command that those accused of criminal offenses be afforded their fundamental right to a jury trial. See, *e. g.*, *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966). At the same time, the Court announces an alarming expansion of the nonjury contempt power, the excessive use of which we have so recently limited in *Bloom* v. *Illinois*, *supra*, and *Cheff* v. *Schnackenberg*, *supra*. The inescapable effect of this recession will be to put a new weapon for chilling

political expression in the unrestrained hands of trial judges. Now freed from the checks and restraints of the jury system, local judges can achieve, for a term of years, significant control over groups with unpopular views through the simple use of the injunctive and contempt power together with a punitive employment of the probation device, the conditions of which offer almost unlimited possibilities for abuse. Because I do not desire to contribute to such a result, and because I believe the Court's rationale rests on a misreading of the probation statute, I must note my dissent.

I.

Today's decision stands as an open suggestion to the courts to utilize oppressive practices for avoiding, in unsettled times such as these, issues that must be squarely faced and for denying our minorities their full rights under the First Amendment. In order to inhibit, summarily, a group seeking to propagate even the least irritating views, a trial judge need only give a quick glance at the Court's opinion to recognize the numerous options now open to him. If, for instance, a large number of civil rights advocates, labor unionists, or student demonstrators are brought into court on minor trespass or disturbance charges, a jury will not be required even though the court proposes to control their lives for as long as five years. Without having to wait for a jury conviction, the trial judge would be free to impose, at will, such a lengthy probation sentence with onerous probation conditions—the effect of which could be oppressive. A trial judge need not wait until laws are violated and prosecutions are actually brought. He can simply issue a blanket injunction against an unpopular group, cite its members for contempt *en masse* for the slightest injunction violation, deny them a jury, and then, by imposing strict conditions, effectively deprive them of any meaningful freedom for an indefinite period

of up to five years. Despite our recent efforts to curb its use (see *Carroll* v. *Princess Anne*, 393 U. S. 175 (1968)) the injunction power has today become, when used with this newly liberated contempt power, too awesome a weapon to place in the hands of one man. The situation presented by *Walker* v. *Birmingham*, 388 U. S. 307 (1967), is but one example of the power now made freely available to trial judges.

The probation conditions imposed in this case (see n. 6, *ante*) illustrate the high degree of control that courts, together with their probation officers, can maintain over those brought before them. Thus, a court can require defendants to keep "reasonable hours" and, in addition, prohibit them from leaving the court's jurisdiction without the probation officer's permission. By instructing the probation officer to construe the reasonable hours restriction strictly and to refuse permission to leave the jurisdiction, a trial court can thereby virtually nullify a person's freedom of movement. Moreover, a court can insist that a defendant "work regularly," and thereby regulate his working life as well. Finally, a court can order a defendant to associate only with "law-abiding" persons, thereby significantly limiting his freedom of association, for this condition, which does not limit revocation of probation to "knowing association," forces him to choose his acquaintances at his peril.

Even these conditions, restrictive as they are, do not represent all the conditions available to a trial judge; he may impose others, and, of course, change or add to the conditions at any time during the five-year period.[1] The court's ability, further, to impose a six-month prison term for a probation violation at any time during that period, even after four years and 11 months, leaves no room for doubt as to the power of the probation officer

[1] If its onerous conditions multiplied, probation could be even more restrictive than the emerging prison work-release programs.

to enforce the restrictions most severely. And finally, the ease with which a probation officer can find a violation of so many broad conditions enhances the value of the probation device as a harassment tactic. Once having found a violation, of course, a trial court need not bother with a fair adversary hearing before committing the offenders to prison, for *Mempa* v. *Rhay*, 389 U. S. 128 (1967), does not require counsel at probation revocation hearings in misdemeanor cases.

If, in hamstringing protest groups, a trial judge is bound only by a five-year maximum probation period and the limits of his imagination in conceiving restrictive conditions, I would at least require that those on the receiving end be tried first by a jury. And the trend may be to allow the States even more leeway than federal courts, for there is nothing in the Court's opinion to prohibit a State from allowing more than five years' probation, or as much as 10 or 15 years. Thus far, we have not held the States to as strict a standard as the federal system; for while we have ruled that no crime punishable by more than six months may be tried without a jury in the federal courts (see *Cheff, supra*), we have yet to find a jury necessary for any crime punishable by less than two years in state courts (see *Duncan, supra*). Furthermore, under the Court's practice of looking to legislative definitions and "existing . . . practices in the Nation," *Duncan, supra,* at 161, for indications of the seriousness of crimes in determining when the right to jury attaches, the Court might accept a State's legislative efforts to allow an indefinite period of probation for professed "petty" offenses. Even at present many States allow more than five years' probation, and some States allow trial courts to impose unlimited probationary sentences.[2]

[2] See the appendix to the Government's brief before this Court for a survey of state probation law and practices.

II.

The painful aspect of today's decision is that its rationale is as impermissible as its consequences. The Court's holding that petitioner's sentence is "within the limits of the congressional definition of petty offenses" is no less than astounding. In the first place, Congress acted quite without regard to the crime classifications set out in 1909 (the present section is based on the Act of March 4, 1909, c. 321, § 335, 35 Stat. 1152) when it passed the probation system in 1925 (Act of March 4, 1925, c. 521, § 1, 43 Stat. 1259). There is simply no indication in the statute itself or its legislative history that 18 U. S. C. § 3651 was intended to modify, complement, add to, or even relate to the petty offense definition, or any definition, in 18 U. S. C. § 1; the reference to capital or life sentence cases, for which probation is prohibited, is made in § 3651 itself, without citation to 18 U. S. C. § 1. More importantly, however, there is every indication that Congress affirmatively determined that probation should *not* affect its earlier definitions by making probation freely available to virtually *all* crimes—including most felonies not thereby rendered "petty" because of probation's imposition. In the second place, even if Congress did "add" probation to the "petty" offense definition, the expanded definition would not necessarily be as binding on us as the Court seems to suggest. We cannot, it seems to me, place unlimited reliance on legislative definitions and "existing . . . practices in the Nation" and thereby allow Congress and the States to rewrite the Sixth Amendment of the Constitution by simply terming "petty" any offense regardless of the underlying sentence.

The Court's misapprehension of the probation statute can better be understood by analyzing first how it arrived at its decision. In holding that a trial judge, acting without a jury conviction, can sentence a man to serve at least five years on probation and an additional six

months, the Court purports to rely on, and not overrule, *Cheff, supra,* where we held that six months' imprisonment was the maximum sentence that could be imposed without a jury in federal cases. We arrived at that determination by seeking "objective indications of the seriousness with which society regards the offense," *ante,* at 148, the standard we have traditionally used in determining whether a particular crime can be classified as "petty" and thus tried without a jury. See *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *Duncan* v. *Louisiana, supra; Bloom* v. *Illinois, supra.* As the Court notes, *Cheff* found the "objective criteria" by analogy to 18 U. S. C. § 1, the congressional definitional section which states that an offense punishable by six months or less is a "petty" offense, and followed that determination in ruling that a six months', nonjury contempt sentence was permissible. The Court pursues that analogy in this case. Thus, it argues that since Congress has also provided that up to five years' probation can be imposed for a "petty" offense, apparently without making such an offense "serious" under the definitional section, petitioner, whose sentence fell within that five-year limit, was not entitled to a jury trial.

Such a leap from the definition of petty offenses in 18 U. S. C. § 1 to the provision for probation in 18 U. S. C. § 3651 ascribes to Congress a determination I am certain it did not make, and misconstrues the nature of the probation statute. The probationary scheme does not purport to set specific sentences for particular classes of crimes, thus evincing an "objective indication" of the "seriousness with which society regards the offense," the standard we have used in determining when the right to jury trial attaches. Rather, it is designed to allow a sentencing judge to put aside the statutorily prescribed prison term and to try instead to fashion a specific, ameliorative sentence for the individual criminal before the court. The sentence should be consistent with pro-

bation's basic purpose of providing "an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement," *Roberts* v. *United States,* 320 U. S. 264, 272 (1943), before such imprisonment "should stain the life of the convict," *United States* v. *Murray,* 275 U. S. 347, 357 (1928).

The focus of probation is not on how society views the offense, but on how the sentencing judge views the offender. "Through the social investigation of the probation officer and the power to place suitable cases on probation," the House Judiciary Committee stated in support of the first probation bill to be signed into law, "the court is enabled to discriminate and adapt its treatment to fit the character and circumstances of the individual offender." H. R. Rep. No. 423, 68th Cong., 1st Sess., 2 (1924). The necessity to "individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender," we have held, requires the "exercise of a broad discretion" and "an exceptional degree of flexibility." *Burns* v. *United States,* 287 U. S. 216, 220 (1932). In exercising that broad discretion, of course, a sentencing judge can utilize probation in all but capital or life sentence cases.

In orienting the probation system toward the individual criminal and not the crime itself, and in making it available for felonies and misdemeanors as well as petty offenses, Congress clearly did not intend the maximum five-year probation period to be any indication of society's views of the seriousness of crimes in general, except to provide that probation is inappropriate for capital or life sentence cases. Although the Court holds that "Congress has not viewed the possibility of five years' probation as onerous enough to make an otherwise petty offense 'serious,' " presumably the Court would not be willing to hold that the upper limit of only five years' probation

is light enough to make any serious offense "petty." For I do not take the Court's opinion to mean that in areas of economic and public health regulation such as tax, antitrust, and drug control, where probation is often granted, a trial judge could deny a defendant's demand for a jury trial by stating at the outset his intention to grant probation with a maximum of six months' imprisonment on violation of its terms. I raise the possibility [3] only because I think it shows that Congress enacted the probation system quite without regard to the "petty-serious" crime distinction, intending the system to have no impact on legislative judgments as to the relative seriousness of classes of crimes generally.

In view of this background, the fact that Congress could not, in all events, limit the right to a jury trial by the use of statutory "definitions," and the dangers noted above in allowing a six-months-plus sentence to be imposed without a jury, I would stand by this Court's decision in *Cheff, supra,* and say that six months is the maximum permissible nonjury sentence, whether served on probation or in prison, or both. Thus, only a two months' jail term could be imposed in federal courts, for instance, if probation were revoked after four months. I dissent from the Court's opinion holding otherwise.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I cannot say what is and what is not a "petty crime." I certainly believe, however, that where punishment of as much as six months *can* be imposed, I could not classify the offense as "petty" if that means that people tried for

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[3] The actual question could never arise, of course, under the Court's present practice of looking, in noncontempt cases, to the statute for the maximum penalty that could be imposed, rather than the sentence actually meted out, for its determination that a jury is or is not required.

it are to be tried as if we had no Bill of Rights. Art. III, § 2, of the Constitution provides that:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

And in Amendment VI it is provided that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Neither of these provisions gives any support for holding that a defendant charged with a crime is not entitled to a jury trial merely because a court thinks the crime is a "petty" one. I do not deny that there might possibly be some offenses charged for which the punishment is so minuscule that it might be thought of as petty. But to my way of thinking, when a man is charged by a governmental unit with conduct for which the Government can impose a penalty of imprisonment for any amount of time, I doubt if I could ever hold it petty. (See my dissent in *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216, 223.) Nor do I take any stock in the idea that by naming an offense for which a man can be imprisoned a "contempt," he is any the less charged with a crime. See *Green* v. *United States*, 356 U. S. 165, 193 (dissenting opinion), and *United States* v. *Barnett*, 376 U. S. 681, 724 (dissenting opinion). Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general.

For these reasons I dissent from the Court's holding that the petitioner in this case is not entitled to a trial by jury.

THOMPSON *v.* TRAVELERS INSURANCE CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 1230. Decided May 19, 1969.

281 Minn. 547, 163 N. W. 2d 289, appeal dismissed and certiorari denied.

T. Eugene Thompson, appellant, *pro se*.

Oscar C. Adamson II and *J. Neil Morton* for appellees Travelers Insurance Co. et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

FRYAR *v.* OKLAHOMA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 730, Misc. Decided May 19, 1969.

Certiorari granted; 440 P. 2d 204, vacated and remanded.

G. T. Blankenship, Attorney General of Oklahoma, and *H. L. McConnell*, Assistant Attorney General, for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *Smith* v. *Hooey*, 393 U. S. 374.

JONES *v.* ILLINOIS BY ITS ELECTORAL BOARD.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1173. Decided May 19, 1969.

Vacated and remanded.

William J. Scott, Attorney General of Illinois, and *Francis T. Crowe,* Assistant Attorney General, for appellee.

PER CURIAM.

The decision of the Illinois Supreme Court having been rendered prior to our decision in *Moore* v. *Ogilvie,* 394 U. S. 814, which overruled *MacDougall* v. *Green,* 335 U. S. 281, the judgment is vacated and the cause remanded so that it can be reconsidered in light of the changed circumstances.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment.

BUCKLEY ET AL., DBA BUCKLEY'S AUTO WRECKING *v.* OHIO BY BARBUTO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1209. Decided May 19, 1969.

16 Ohio St. 2d 128, 243 N. E. 2d 66, appeal dismissed and certiorari denied.

Edward D. Wyner for appellants.

Paul W. Brown, Attorney General of Ohio, *pro se*, and *Robert D. Macklin*, Assistant Attorney General, for the Attorney General of Ohio, and *James V. Barbuto, pro se*, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CRANE *v.* CEDAR RAPIDS & IOWA CITY RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 791. Argued April 24, 1969.—Decided May 26, 1969.

The Federal Safety Appliance Act of 1893 requires interstate railroads to equip freight cars "with couplers coupling automatically by impact," but does not create a federal cause of action for employees or nonemployees seeking damages for injuries resulting from a railroad's violation of the Act. The Federal Employers' Liability Act of 1908 provides a cause of action for a railroad employee based on a violation of the Safety Appliance Act, in which he is required to prove only the statutory violation and the carrier is deprived of the defenses of contributory negligence and assumption of risk. Petitioner, a nonemployee of respondent railroad, sued in the Iowa courts for damages resulting from a defective coupler, in violation of the Safety Appliance Act. The jury, which was instructed that petitioner had "to establish by a preponderance or the greater weight of the evidence . . . that [he] was free from contributory negligence," returned a verdict for the railroad. *Held:* In accordance with consistent interpretation of the statutory scheme, a nonemployee must look for his remedy to a common-law action in tort and, in the absence of diversity, must sue in a state court; and the definition of causation and the availability of the defenses of assumption of risk and contributory negligence are left to state law. Pp. 166–167.

— Iowa —, 160 N. W. 2d 838, affirmed.

E. Barrett Prettyman, Jr., argued the cause for petitioner. With him on the briefs were *John B. Halloran* and *James L. Alfveby.*

William M. Dallas argued the cause for respondent. With him on the brief was *John F. Gaston.*

Edward J. Hickey, Jr., and *James L. Highsaw, Jr.*, filed a brief for the Railway Labor Executives' Assn. as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether a State may make the defense of contributory negligence available to a railroad sued by a nonemployee for damages for personal injuries caused by the railroad's failure to maintain its freight cars "with couplers coupling automatically by impact," as required by § 2 of the Federal Safety Appliance Act of 1893, 27 Stat. 531, 45 U. S. C. § 2.[1]

Petitioner was in the employ of Cargill, Inc., at its Cedar Rapids, Iowa, meal house and elevator on the line of respondent railroad. Petitioner's duties were to move, weigh, and load freight cars spotted by respondent on Cargill's siding track. He was working on the top of the third of a string of six cars when a coupler malfunctioned and caused the first two cars to break away. Petitioner dismounted and ran to the runaway cars. He climbed to the roof of one and was attempting to apply its brake when he fell 12 to 14 feet to a cement apron between the tracks and suffered severe injuries. He brought this action in tort in the Iowa District Court of Linn County. The only claim submitted to the jury was that petitioner's injuries resulted from respondent's maintenance, in violation of § 2, of a freight car with a defective coupler. Over petitioner's objection the jury was instructed in accordance with settled Iowa tort law that it was petitioner's burden "to establish by a preponderance or the greater weight of

[1] Section 2 of the Safety Appliance Act provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 45 U. S. C. § 2.

the evidence . . . that [he] was free from contributory negligence," defined as "negligence on the part of a person injured . . . which contributed in any way or in any degree directly to the injury." The jury returned a verdict for respondent railroad. The Supreme Court of Iowa affirmed, — Iowa —, 160 N. W. 2d 838 (1968). We granted certiorari. 393 U. S. 1047 (1969). We affirm.

The Safety Appliance Act did not create a federal cause of action for either employees or nonemployees seeking damages for injuries resulting from a railroad's violation of the Act. *Moore* v. *C. & O. R. Co.*, 291 U. S. 205 (1934). Congress did, however, subsequently provide a cause of action for employees: The cause of action created by the Federal Employers' Liability Act of 1908, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, embraces claims of an employee based on violations of the Safety Appliance Act. In such actions, the injured employee is required to prove only the statutory violation and thus is relieved of the burden of proving negligence, *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U. S. 384 (1949); *Coray* v. *Southern Pac. R. Co.*, 335 U. S. 520 (1949); *Affolder* v. *New York, C. & St. L. R. Co.*, 339 U. S. 96 (1950). He is not required to prove common-law proximate causation but only that his injury resulted "in whole or in part" from the railroad's violation of the Act, 45 U. S. C. § 51; *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500 (1957), and the railroad is deprived of the defenses of contributory negligence and assumption of risk, 45 U. S. C. §§ 53, 54.

In contrast, the nonemployee must look for his remedy to a common-law action in tort, which is to say that he must sue in a state court, in the absence of diversity, to implement a state cause of action. *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589 (1934). "[T]he right to recover damages sustained . . . through the breach of

duty sprang from the principle of the common law . . . and was left to be enforced accordingly . . . ." *Moore* v. *C. & O. R. Co., supra,* at 215. In consequence, we have consistently held that under the present statutory scheme the definition of causation and the availability of the defenses of assumption of risk and contributory negligence are left to state law. *Schlemmer* v. *Buffalo, R. & P. R. Co.,* 220 U. S. 590 (1911); *Fairport, P. & E. R. Co.* v. *Meredith, supra,* at 598; *Moore* v. *C. & O. R. Co., supra,* at 215; *Tipton* v. *Atchison, T. & S. F. R. Co.,* 298 U. S. 141 (1936). Our examination of the relevant legislative materials convinces us that this line of decisions should be reaffirmed.[2]

We recognize the injustice of denying recovery to a nonemployee which would not be denied to an employee performing the same task in the same manner as did petitioner.[3] But it is for Congress to amend the statute to prevent such injustice. It is not permitted the Court to rewrite the statute.

Affirmed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

Congress, not the States, passed the Federal Safety Appliance Act of 1893, 27 Stat. 531, 45 U. S. C. § 1 *et seq.* Consequently, I think the question of a railroad's liability to a person injured by a violation of that Act is a federal, not a state, question. Although it is true that several old cases, cited by the Court, gave the Safety Appliance Act a different interpretation, and left injured workers to

[2] In addition to the Federal Safety Appliance Act and the Federal Employers' Liability Act, see H. R. Rep. No. 1386, 60th Cong., 1st Sess., 6 (1908).

[3] See Louisell & Anderson, The Safety Appliance Act and the FELA: A Plea for Clarification, 18 Law & Contemp. Prob. 281 (1953).

whatever remedies they might have under state law, the premises of these old decisions have been thoroughly and I think properly discredited. See *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964).

The Federal Employers' Liability Act of 1908, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, allows railroad employees injured by violations of the Safety Appliance Act to recover against their employer, and contributory negligence of the employee is not a defense. I cannot believe that Congress intended that contributory negligence should become a defense simply because the action is brought by a nonemployee, when an employee doing the same work and subjected to the same violation of the Safety Appliance Act could clearly recover. For this reason I would hold that under federal law contributory negligence is not a defense in this case and reverse the judgment of the Iowa Supreme Court.

Syllabus.

SULLIVAN, TAX COMMISSIONER OF CONNECTICUT, ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 610. Argued April 2, 1969.—Decided May 26, 1969.

Section 514 of the Soldiers' and Sailors' Civil Relief Act does not exempt servicemen stationed in Connecticut who are residents or domiciliaries of other States from sales and use taxes imposed by Connecticut. Pp. 171–184.

398 F. 2d 672, reversed.

F. Michael Ahern, Assistant Attorney General of Connecticut, argued the cause for appellants. With him on the briefs were *Robert K. Killian,* Attorney General, and *Ralph G. Murphy* and *Richard A. Gitlin,* Assistant Attorneys General.

Harris Weinstein argued the cause for the United States et al. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Walters,* and *Stuart A. Smith.*

Briefs of *amici curiae* in support of appellants were filed by the State of Louisiana and by the Attorneys General for their respective States as follows: *MacDonald Gallion* of Alabama, *Duke W. Dunbar* of Colorado, *Robert K. Killian* of Connecticut, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Kent Frizzell* of Kansas, *John B. Breckinridge* of Kentucky, *James S. Erwin* of Maine, *Francis B. Burch* of Maryland, *Robert H. Quinn* of Massachusetts, *Frank J. Kelley* of Michigan, *Douglas M. Head* of Minnesota, *John C. Danforth* of Missouri, *Clarence A. H. Meyer* of Nebraska, *Harvey Dickerson* of Nevada, *Arthur J. Sills* of New Jersey, *Robert B. Morgan* of North Carolina, *Helgi Johanneson* of North Dakota, *Paul W. Brown* of Ohio, *G. T. Blankenship* of Oklahoma,

Robert Y. Thornton of Oregon, *William C. Sennett* of Pennsylvania, *Herbert F. DeSimone* of Rhode Island, *Gordon Mydland* of South Dakota, *George F. McCanless* of Tennessee, *Crawford C. Martin* of Texas, *Vernon B. Romney, Jr.*, of Utah, *Robert Y. Button* of Virginia, *Slade Gorton* of Washington, and *James E. Barrett* of Wyoming; by *Gary K. Nelson*, Attorney General, for the State of Arizona; by *Thomas C. Lynch*, Attorney General, *Ernest P. Goodman*, Assistant Attorney General, and *Philip W. Marking*, Deputy Attorney General, for the State of California, and *William J. Scott*, Attorney General, for the State of Illinois; and by *Louis J. Lefkowitz*, Attorney General, *Ruth Kessler Toch*, Solicitor General, and *Robert W. Bush*, Assistant Attorney General, for the State of New York.

Benjamin M. Wall filed a brief for Stanley Fissel as *amicus curiae* in support of the United States et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue raised by this appeal is whether § 514 of the Soldiers' and Sailors' Civil Relief Act [1] prohibits Connecticut from imposing its sales and use taxes on servicemen stationed there who are residents or domiciliaries of other States. The United States instituted this action in federal court against the appropriate Connecticut officials on behalf of the aggrieved servicemen.[2]

[1] As added by § 17 of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, 56 Stat. 777, and as amended, 58 Stat. 722, 76 Stat. 768, 50 U. S. C. App. § 574.

[2] Although the issue was raised in the District Court, the appellants no longer dispute the right of the United States to bring this action on behalf of the servicemen in federal court. See *Department of Employment* v. *United States*, 385 U. S. 355, 358; *United States* v. *Arlington County*, 326 F. 2d 929.

In this Court the United States has presented arguments prepared by officers of the Department of Justice in support of the judgment

The District Court entered a declaratory judgment that the federal statute prevents collection of the sales and use taxes from such servicemen,[3] and the Court of Appeals affirmed.[4] We noted probable jurisdiction of this appeal.[5]

The sales and use taxes imposed by the Connecticut Education, Welfare and Public Health Tax Act [6] are typical of those enacted by the vast majority of States.[7] A tax of 3½% is levied on the gross receipts from sales of tangible personal property at retail within the State.[8] Although the retailer is liable for payment of the tax, he is required to pass it on to purchasers by adding it to the original sales price of all items sold.[9] The use tax is imposed at the same rate on "the storage, use or other consumption" in the State of tangible personal

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below. The Solicitor General and the Assistant Attorney General in charge of the Tax Division of the Department of Justice have informed the Court, however, that they have not been persuaded by those arguments, and that they do not believe that § 514 was intended to apply to the ordinary retail sales tax and concomitant use tax now imposed by most of the States. For other examples of such divergence of opinion among representatives of the United States before this Court, see *De Laval Steam Turbine Co.* v. *United States*, 284 U. S. 61, 67–68; *Kornhauser* v. *United States*, 276 U. S. 145, 147–151.

[3] 270 F. Supp. 236. The District Court later amended its judgment to permit Connecticut to continue to collect sales and use taxes from nonresident servicemen, provided that the amounts collected would be refunded if the judgment was ultimately sustained.

[4] 398 F. 2d 672.

[5] 393 U. S. 1012.

[6] Conn. Gen. Stat. Rev. §§ 12–406 to 12–432a.

[7] See J. Hellerstein, State and Local Taxation Cases and Materials 15 (3d ed. 1969). 35 States have filed briefs in this case in support of the position of Connecticut.

[8] § 12–408 (1). This section also imposes the sales tax on "the privilege of . . . transferring occupancy of any room or rooms in a hotel or lodging house."

[9] § 12–408 (2).

property purchased from any retailer.[10] The use tax provisions—designed to reach the use or consumption in the State of property purchased outside it[11]—exempt all transactions which are subject to the sales tax.[12] And while the consumer is liable directly to the State for the use tax, he can discharge his liability by paying it to the retailer if the retailer is "engaged in business" within the State and therefore required to collect the use tax.[13] The use tax is also imposed upon purchasers of motor vehicles, boats, or airplanes from nonretailers.[14] The amount of any tax under the Act is reduced by whatever sales or use tax has already been collected "by any other state or political subdivision thereof."[15] Finally, the Act commands that all proceeds of the sales and use taxes "shall be allocated to and expended for public health, welfare and education purposes only."[16]

By stipulation and affidavits in the District Court, the parties offered some examples of the imposition of these taxes on naval personnel stationed in Connecticut but domiciled elsewhere. Lieutenant Schuman, a Nebraska domiciliary, and Commander Carroll, a Michigan domiciliary, bought used motorboats from nonretailers in Connecticut and were assessed a use tax. Schuman paid the tax under protest, and Carroll has refused to pay, each claiming that he is exempt under the Soldiers' and

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[10] § 12–411 (1).

[11] See, *e. g.*, *Stetson* v. *Sullivan*, 152 Conn. 649, 652–653, 211 A. 2d 685, 686; *Avco Mfg. Corp.* v. *Connelly*, 145 Conn. 161, 170–171, 140 A. 2d 479, 484; *Connecticut Light & Power Co.* v. *Walsh*, 134 Conn. 295, 299–300, 57 A. 2d 128, 130–131.

[12] § 12–413 (1).

[13] §§ 12–411 (2), (3).

[14] § 12–431.

[15] § 12–430 (5).

[16] § 12–432.

Sailors' Civil Relief Act.[17] Lieutenant Commander Shaffer and Commander Foster, who are domiciled in Pennsylvania and Texas respectively, each purchased a new car; the Connecticut retailer collected and paid the sales tax. Foster registered his car in Texas, which also exacted a sales or use tax.[18] Finally, Commander Roloff, whose home State is Wisconsin, purchased a used car in Florida and paid that State a 2% sales tax. When he registered the car in Connecticut, he was assessed and paid the use tax, with credit for the Florida sales tax.

As enacted in 1942,[19] § 514 of the Soldiers' and Sailors' Civil Relief Act provided that for purposes of any state "taxation in respect of any person, or of his [personal][20] property, income, or gross income," he shall not be

[17] Lieutenant Schuman joined the United States as a party plaintiff in the District Court, seeking to represent the class of all servicemen or former servicemen from whom Connecticut had collected or threatened to collect any sales or use tax. The complaint was dismissed as to him for lack of jurisdiction, on the grounds that the requisite jurisdictional amount was not alleged to be in controversy and that the Eleventh Amendment forbids a suit by a private individual against a State in the federal courts. 270 F. Supp. 236, 246–247.

[18] Foster's situation is not entirely clear. His affidavit states that officials of the Connecticut Department of Motor Vehicles informed him that he was required to pay a use tax but the tax actually paid was identified on the dealer's invoice as a sales tax. The latter seems to be correct, since the purchase was from a Connecticut retailer. Texas officials told Foster he would have to pay a sales tax in order to register the car in that State. The Texas tax collector's receipt does not identify whether the payment was a sales or use tax, however, and under the Texas statutes it appears more likely that it was the latter. Tex. Rev. Civ. Stat., Art. 6.01, provides that the motor vehicle sales tax applies only to sales in the State, while the use tax, in the same amount, applies to out-of-state sales of motor vehicles for use in Texas.

[19] 56 Stat. 777.

[20] The word "personal" was interpolated by the 1944 amendment. 58 Stat. 722.

deemed to have lost his residence or domicile in his home State or acquired a residence in any other State "solely by reason of being absent [from home] in compliance with military or naval orders." Clarifying language was added in 1944 to provide that for purposes of taxation in respect of personal property, the "personal property shall not be deemed to be located or present in or to have a situs for taxation in such State." Also in 1944 Congress enacted a special subsection for automobiles: servicemen are exempt from "licenses, fees, or excises imposed in respect of motor vehicles or the use thereof" if they have paid such levies in their home States. Finally, in 1962,[21] Congress added the provision that § 514 applies to property in any tax jurisdiction other than the serviceman's home State, "regardless of where the owner may be serving" in compliance with military orders.[22]

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[21] 76 Stat. 768.

[22] Section 514, as set forth in 50 U. S. C. App. § 574, now reads in its entirety as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal

We think it clear from the face of § 514 that state taxation of *sales* to servicemen is not proscribed. A tax on the privilege of selling or buying property has long been recognized as distinct from a tax on the property itself.[23] And while § 514 refers to taxes "in respect of" rather than "on" personal property, we think it an overly strained construction to say that taxation of the sales transaction is the same as taxation "in respect of" the personal property transferred. Nor does it matter to the imposition of the sales tax that the property "shall not be deemed to be located or present in or to have a situs for taxation" in Connecticut. The incidence of the sales tax is not the property itself or its presence within the State. Rather it is the transfer of title for considera-

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property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: *Provided*, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

[23] See, *e. g.*, N. Jacoby, Retail Sales Taxation 3–4 (1938). And see n. 28, *infra*.

tion,[24] a legal act which can be accomplished without the property ever entering the State.[25] Had Congress intended to include sales taxes within the coverage of § 514, it surely would not have employed language so poorly suited to that purpose as "taxation in respect of the personal property."

It is contended on behalf of the servicemen that, even if § 514 does not encompass sales taxes, at least it prohibits taxation of the *use* of personal property. Not only are use taxes said to fall literally within the meaning of the phrase "taxation in respect of the personal property," but § 514 specifically refers in two places to property "or the use thereof." Moreover, it is argued, the sole jurisdictional basis of the use tax is the location of the personal property in Connecticut; yet imposition of a tax with such incidence on a serviceman contravenes the command of § 514 that his personal property "shall not be deemed to be located or present in or to have a situs for taxation in such State." While we agree that use taxes are not so clearly excluded by the language of § 514 as are sales taxes, neither do we believe that they are clearly included. And consideration of the purpose and legislative history of § 514 along with its language and other factors has led us to the conclusion that Congress did not intend to free servicemen stationed away from home from the sales *or* use taxes of the host State.

The legislative history of the 1942 enactment and the 1944 and 1962 amendments of § 514 reveals that Congress intended the Act to cover only annually recurring taxes *on* property—the familiar ad valorem personal

[24] The Connecticut statute defines a "sale" generally as "[a]ny transfer of title . . . for a consideration." § 12–407 (2) (a). And see *Avco Mfg. Corp.* v. *Connelly*, 145 Conn. 161, 172, 140 A. 2d 479, 484–485. The term also includes a transaction in which the right of possession is transferred but the seller retains title as security. § 12–407 (2) (f).

[25] See Conn. Gen. Stat. Rev. § 42a–2–401 (3).

property tax. Thus, the reports advert to the possibility that servicemen ordered to move around the country—as they were increasingly during World War II—might have their property taxed by more than one State "within the same calendar year." [26] And the reports throughout refer explicitly to "personal-property taxes on property." [27] The language of these reports is simply irreconcilable with the proposition that Congress thought the Act would apply to a tax which, like the sales or use tax, does not apply annually to all personal property within the State but is imposed only once and then only when there has been a retail sales transaction.[28]

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[26] S. Rep. No. 1558, 77th Cong., 2d Sess., 11 (1942); H. R. Rep. No. 2198, 77th Cong., 2d Sess., 6 (1942).

[27] S. Rep. No. 959, 78th Cong., 2d Sess., 1 (1944). See also the reference to "personal property taxes" in H. R. Rep. No. 1514, 78th Cong., 2d Sess., 2 (1944). The reports on the 1942 Act talked about "taxation of the property" and the possibility that "the personal property . . . may become liable for taxes in several States." S. Rep. No. 1558, *supra*, n. 26, at 11; H. R. Rep. No. 2198, *supra*, n. 26, at 6. At the time of the 1962 Amendment, the reports continued to describe the taxes covered by § 514 as those "imposed upon property of a serviceman." S. Rep. No. 2182, 87th Cong., 2d Sess., 1 (1962); H. R. Rep. No. 2126, 87th Cong., 2d Sess., 1 (1962).

[28] It has frequently been said that a use tax, like a sales tax, is an excise or privilege tax different in kind from a tax *on* property. *E. g.*, *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 649. As the Connecticut Supreme Court has described the very tax here in question, "The use tax is not a tax on property but is described in the act as, and in fact is, in the nature of an excise tax upon the privilege of using, storing or consuming property." *Connecticut Light & Power Co.* v. *Walsh*, 134 Conn. 295, 307, 57 A. 2d 128, 134. This distinction may sometimes be more formal than actual, cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582, 586. But its long-time general acceptance supports the conclusion that when Congress talked about taxes on, or even "in respect of," personal property, it did not thereby include use taxes.

This conclusion is further buttressed by the close interconnection of sales and use taxes. See generally 3 State Taxation of Interstate

The absence of any reference to sales and use taxes in the history of § 514 is particularly illuminative of legislative intent when considered in the light of Congress' full awareness of such state taxes and their relationship to federal interests. Sales and use taxes were prevalent by 1942,[29] and Congress had dealt specifically with them only two years earlier. In the 1940 Buck Act,[30] Congress provided that the States have "full jurisdiction and power to levy and collect" sales and use taxes in "any Federal area," [31] except with respect to the sale or use of property sold by the United States or its instrumentalities through commissaries, ship's stores, and the like.[32] If nothing

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Commerce, H. R. Rep. No. 565, 89th Cong., 1st Sess., 607–620 (1965). As a complement to the sales tax and an integral part of a single broad pattern of excise taxes, the use tax is not likely to have been grouped by Congress with taxes "in respect of the personal property."

[29] By 1938, more than half the States had adopted sales and use taxes. See 3 State Taxation of Interstate Commerce, *supra*, n. 28, at 609.

[30] 54 Stat. 1059, now 4 U. S. C. §§ 105–110.

[31] 4 U. S. C. § 105 (a) states:

"No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

[32] 4 U. S. C. § 107 states:

"(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

"(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the

else, this statute illustrates that Congress in 1942 was fully cognizant of state sales and use taxes and identified them by name when it wanted to deal with them. Moreover, it is unlikely that Congress, which had in 1940 expressly authorized sales and use taxation of servicemen everywhere on federal military reservations except post exchanges, would two years later have exempted so many of them from such taxes by means of such imprecise language as that of § 514 of the Soldiers' and Sailors' Civil Relief Act. And since servicemen can apparently purchase all the necessities and many of the luxuries of life tax-free at military commissaries,[33] Congress may reasonably have considered the occasional sales and use taxes that servicemen might have to pay an insignificant burden, as compared with annual ad valorem property taxes, and consequently not deserving of the same exemption.[34]

Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch."

[33] The stipulation filed in the District Court contained the following:

"11. Most of the day-to-day purchases of tangible personal property, which includes food, clothing, toilet articles and other personal items, made by servicemen in Connecticut are made from military exchanges, and commissaries operated by the armed services on military installations.

"12. Sales made by military exchanges and commissaries operated by the armed services on military installations to servicemen are not subject to any tax under the Tax Act."

[34] Conversely, the administrative burden which the States would have to shoulder if § 514 applied to sales and use taxes is potentially far greater than that attributable to the exemption from ad valorem property taxes. Whereas property taxation involves only the property owner and the tax officials, sales and use taxation usually requires participation and accounting by the seller as well. And the accounting difficulties which retailers and the States would encounter in determining for thousands of transactions which customers were properly exempt under § 514 are considerably greater than any that Congress can be thought to have envisioned for the exemption from property taxes alone.

Section 514 does not relieve servicemen stationed away from home from all taxes of the host State. It was enacted with the much narrower design "to prevent multiple State taxation of the property." [35] And the substantial risk of double taxation under multi-state ad valorem property taxes does not exist with respect to sales and use taxes. Like Connecticut, nearly every State which levies such taxes provides a credit for sales or use taxes paid on the transaction to another State.[36] Of course it is true, as we held in *Dameron* v. *Brodhead*, 345 U. S. 322, that § 514 prevents imposition of ad valorem property taxes even though the serviceman's home State does not tax the property. But the predominant legislative purpose nonetheless remains highly relevant in determining the scope of the exemption, and the absence of any significant risk of double taxation under state sales and use taxes generally is therefore strong evidence of congressional intent not to include them in §514.

The language of § 514 does not undercut our conclusion that Congress did not propose to exempt servicemen from sales and use taxes. The appellees, like the courts below, make much of the reference at two places in the section to property "or the use thereof." This phrase first appeared in the 1944 addition of subsection (2)(b):

> "When used in this section, . . . (b) the term 'taxation' shall include but not be limited to licenses,

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[35] S. Rep. No. 1558, *supra*, n. 26, at 11; H. R. Rep. No. 2198, *supra*, n. 26, at 6. This purpose was restated in the 1944 reports: "When the Soldiers' and Sailors' Civil Relief Act of 1940 was amended by the act of October 6, 1942, a provision was written into the act to relieve persons in the service from liability of double taxation by being moved from one State to another under orders." H. R. Rep. No. 1514, *supra*, n. 27, at 2. And see S. Rep. No. 959, *supra*, n. 27, at 1.

[36] See Prentice-Hall State and Local Tax Service, All States Unit, ¶ 92,963.

> fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided,* That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."

The second reference to "use" did not appear until the addition to subsection (1) of the following sentence in 1962:

> "Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders . . . ."

We think that, in light of the clear indications of congressional intent discussed above, the most sensible inference to be drawn from this language is that the only taxes on the *use* of property from which servicemen are exempted are the special registration taxes imposed annually by all States on the use of motor vehicles. Indeed, this interpretation is supported by the structure of § 514 itself. There is no reference to "use" of property in those portions of subsection (1) which set out the basic exemption and in which Congress would naturally have been expected to mention use taxes had it meant to include them. Moreover, subsection (2)(b) does *not* say that for purposes of § 514 "taxation" includes "licenses, fees, or excises" on the use of *all* personal property except those in respect of motor vehicles for which such fees have not been paid at home. Rather it says that "taxation" includes such levies *only on motor vehicles* when they have been paid at home. Thus, as we held in *California* v. *Buzard,* 382 U. S. 386, subsection (2)(b) does not encompass ordinary revenue-raising

excise or use taxes, but is limited to "those taxes which are essential to the functioning of the host State's licensing and registration laws in their application to the motor vehicles of nonresident servicemen." *Id.*, at 395. The Court held in *Buzard* that § 514 exempted servicemen from the California tax on automobiles, not because it *was* an excise tax on use covered by subsection (2)(b), but rather because it was *not* such a tax.[37] The so-called "license fee" there in question was an annual tax in the amount of 2% of the assessed market value of the car—a levy which was indistinguishable from the annually recurring ad valorem taxes that § 514 was designed to cover.[38]

It is thus evident that in subsection (2)(b) Congress was dealing solely with a unique form of state "tax"—the motor vehicle registration fee. Because such fees are not always clearly classifiable as property taxes,[39] servicemen would not be exempted from many of them by subsection (1) of § 514. Since annually recurring license fees raise much the same risk of double taxation to transitory military personnel as do property taxes, Congress evidently decided in 1944 to extend the exemption of § 514 to include motor vehicle registration fees as well as property taxes. From 1944 to 1962 the only reference in § 514 to "use" of property was found in

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[37] See also *Snapp* v. *Neal*, 382 U. S. 397, 398: "We reverse on the authority of our holding today in *Buzard* that the failure to pay the motor vehicle 'license, fee, or excise' of the home State entitles the host State only to exact motor vehicle taxes qualifying as 'licenses, fees, or excises'; the ad valorem tax, as the Mississippi Supreme Court acknowledged, is not such an exaction."

[38] Indeed, the Court in *Buzard* emphasized that the tax had been adopted by California "as a substitute for local ad valorem taxation of automobiles." 382 U. S., at 395, n. 9. California's sales and use taxes were not involved in that case.

[39] See *California* v. *Buzard*, 382 U. S., at 394, n. 8, for the various methods by which States impose registration or license fees on motor vehicles.

subsection (2)(b). And, in view of the narrow purpose of that subsection and the absence for 20 years of any other reference to "use" in § 514, we cannot believe the repetition of that word in the 1962 amendment—described by Congress as a mere clarification of the existing law [40]—can be deemed to have added all use taxes to the coverage of the statute. The 1962 amendment merely reflected the prior reference to the "use" of motor vehicles in subsection (2)(b).

Finally, we find unpersuasive the appellees' contention that, since the Connecticut use tax can be applied only with respect to personal property used within the State, its imposition on servicemen away from home cannot be squared with the declaration of § 514 that "personal property shall not be deemed to be located or present in or to have a situs for taxation in such State." That clause is modified by the opening words of the sentence—"[f]or the purposes of taxation in respect of the personal property." Section 514, therefore, does not in terms relieve servicemen from every state tax which is somehow dependent on the presence of personal property within the State. Rather, it provides only that a State cannot justify imposing the taxes to which § 514 was initially intended to apply—annually recurring ad valorem property taxes—on the ground of the property's presence within the State.

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[40] "This bill amends the tax immunity provisions of the Soldiers' and Sailors' Civil Relief Act . . . *so as to clarify* a situation which sometimes results in taxation contrary to the intent of the act. More specifically, the bill provides that where a serviceman is absent from his residence or domicile solely by reason of compliance with military or naval orders, *the tax immunity provision of existing law shall apply with respect to his personal property, or the use thereof,* within any tax jurisdiction other than his State of residence or domicile, regardless of where such serviceman may be located in compliance with such orders." (Emphasis supplied.) S. Rep. No. 2182, *supra,* n. 27, at 1.

This construction is confirmed by the explanation which Congress itself gave for the addition in 1944 of the language on which the appellees rely:

> "The purpose of the proposed legislation is to clarify the intent of section 514 of the Soldiers' and Sailors' Civil Relief Act . . . . When that provision of law was added to the act to relieve persons in service from liability of double taxation by being moved from one State to another under orders, it was intended that it should apply to personal-property taxes as well as to income taxes. As presently constituted, it primarily affects taxes in respect to income and other taxes based on residence or domicile, but it does not prevent the State of 'temporary residence' from taxing tangible personal property actually located in such State so long as the tax does not depend on residence or domicile. A few States have taken the position that tangible personal property of military personnel who are only temporarily within their jurisdiction does not acquire a situs for taxation, but it has been held that section 514 of the act as now written does not affect the right of a State to assess personal-property taxes on property within its jurisdiction." [41]

The 1944 amendment, therefore, had only the limited purpose "to clarify" Congress' original intent to cover "personal-property taxes on property," not to expand the exemption in a manner which would include sales or use taxes.

For these reasons we hold that § 514 of the Soldiers' and Sailors' Civil Relief Act does not exempt servicemen from the sales and use taxes imposed by Connecticut. Accordingly, the judgment is

Reversed.

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[41] S. Rep. No. 959, *supra*, n. 27, at 1.

McKART *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 403. Argued February 27, 1969.—Decided May 26, 1969.

Petitioner had been classified IV–A (sole surviving son status). When the Selective Service Board learned of the death of petitioner's mother, it reclassified him I–A (available for military service), on the theory that the IV–A classification became improper when the "family unit" ceased to exist. Petitioner did not appeal the reclassification. Upon his failure to report as ordered for his pre-induction physical examination, he was declared a delinquent. He failed to report for induction as ordered and was indicted for such failure and tried. His only defense was that he was improperly denied a sole surviving son exemption. The District Court held that defense unavailable because petitioner had failed to exhaust the administrative remedies provided by the Selective Service System. Petitioner was convicted and the Court of Appeals affirmed. *Held:*

1. Petitioner was entitled to exemption from military service, as the termination of the "family unit" was not intended by Congress to warrant ending the sole surviving son exemption under § 6 (*o*) of the Selective Service Act. Pp. 189–192.

2. Petitioner's failure to appeal his classification and his failure to report for a pre-induction physical examination do not foreclose his challenging the validity of his classification as a defense to criminal prosecution for refusal to submit to induction. Pp. 192–203.

(a) Though the doctrine of exhaustion of administrative remedies is applied in a number of different situations, it is subject to numerous exceptions. P. 193.

(b) The exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress created. At the heart of the Selective Service System are the local boards which register and classify those subject to the Selective Service Laws, from whose action the registrant has the right of appeal. P. 195.

(c) Although the Act as it stood when petitioner was tried provided that local board decisions were "final," a registrant

charged with failure to report can raise the defense that there was "no basis in fact" for his classification. See *Estep* v. *United States*, 327 U. S. 114, 123. P. 196.

(d) This case does not involve premature resort to the courts (since all administrative remedies are now foreclosed), but failure to have utilized the particular administrative process of appeal. Pp. 196–197.

(e) When petitioner was reclassified the statute did not require the registrant to raise all his claims before an appeal board. P. 197.

(f) Determining whether petitioner is entitled to the sole surviving son exemption (which is solely a matter of statutory interpretation) requires no particular expertise on the appeal board's part as many Selective Service questions do, and judicial review would not be significantly aided by that kind of additional administrative decision. Pp. 197–199.

(g) Failure to require exhaustion of administrative remedies in this case will not significantly encourage registrants to bypass available administrative remedies at the risk of criminal prosecution. Pp. 199–200.

(h) Petitioner is not being prosecuted for his failure to report for physical examination and such failure does not bar him from challenging the validity of his classification as a defense to his criminal prosecution. *Falbo* v. *United States*, 320 U. S. 549, distinguished. Pp. 201–203.

395 F. 2d 906, reversed and remanded.

George C. Pontikes argued the cause for petitioner. With him on the briefs was *Marshall Patner.*

Francis X. Beytagh, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was indicted for willfully and knowingly failing to report for and submit to induction into the

Armed Forces of the United States.[1] At trial, petitioner's only defense was that he should have been exempt from military service because he was the "sole surviving son" of a family whose father had been killed in action while serving in the Armed Forces of the United States.[2] The District Court held that he could not raise that defense because he had failed to exhaust the administrative remedies provided by the Selective Service System. Accordingly, petitioner was convicted and sentenced to three years' imprisonment. The Court of Appeals affirmed, with one judge dissenting. *United States* v. *McKart*, 395 F. 2d 906 (C. A. 6th Cir. 1968). We granted certiorari. 393 U. S. 922 (1968).

I.

The facts are not in dispute. Petitioner registered with his local Selective Service board shortly after his 18th birthday and thereafter completed his classification

[1] "Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ." Selective Service Act of 1948, § 12, 62 Stat. 622, as amended, now § 12 of the Military Selective Service Act of 1967 (see 81 Stat. 100, § 1 (a)), 50 U. S. C. App. § 462 (1964 ed., Supp. III).

[2] "Except during the period of a war or a national emergency declared by the Congress after the date of the enactment of the 1964 amendment to this subsection [July 7, 1964], where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service, the sole surviving son of such family shall not be inducted for service under the terms of this title . . . unless he volunteers for induction." Selective Service Act of 1948, § 6 (*o*), 62 Stat. 613, as amended, 50 U. S. C. App. § 456 (*o*).

questionnaire. On that form he indicated that he was "the sole surviving son of a family of which one or more sons or daughters were killed in action . . . while serving in the Armed Forces of the United States . . . ." On February 25, 1963, petitioner's local board placed him in Class I–A, available for military service; he made no attempt to appeal that classification.[3]

On March 23, 1964, he was ordered to report for a pre-induction physical, but failed to do so. He was declared a delinquent and ordered to report for induction on May 11, 1964. He failed to report, but instead wrote a letter to his local board indicating that his moral beliefs prevented him from cooperating with the Selective Service System. The local board replied by sending petitioner the form for claiming conscientious objector status. The board also referred to petitioner's indication in his original questionnaire that he was a sole surviving son and requested further information on that subject.

On May 20, 1964, petitioner returned the blank form, stating that he did not wish to be a conscientious objector. In response to the board's request for information about his claim to be a sole surviving son, petitioner indicated that his father had been killed in World War II. The local board, after consulting the State Director, again wrote petitioner requesting more information about his father. Petitioner supplied some of the information. The local board forwarded this information to the State

[3] A registrant has the right to appear before his local board to contest his classification or to present new information to the board. 32 CFR §§ 1624.1, 1624.2 (1969). The board then determines whether or not to reconsider the registrant's classification. 32 CFR §§ 1624.2 (c), (d) (1969). Following the local board's decision, the registrant has the right to appeal to the state appeal board. 32 CFR §§ 1624.2 (e), 1625.13 (1969). A further appeal may be taken by the registrant to the National Selective Service Appeal Board only if one or more members of the state appeal board dissent from the board's decision. 32 CFR § 1627.3 (1969).

Director, who requested the local board to reopen petitioner's classification.[4] The board canceled his induction order and reclassified him IV–A, the appropriate classification for a registrant exempted as a sole surviving son. Petitioner remained in that classification until February 14, 1966.

Early in 1966, the local board learned of the death of petitioner's mother. After checking with the State Director, the board returned petitioner to Class I–A. The board rested this decision on the theory that a IV–A classification became improper when petitioner's "family unit" ceased to exist on the death of his mother. Petitioner was ordered to report for a pre-induction physical. He failed to report and was declared a delinquent and ordered to report for induction. He again failed to report and, after further investigation, his criminal prosecution followed.[5]

II.

We think it clear that petitioner was exempt from military service as a sole surviving son. The sole surviving son exemption originated in the Selective Service Act of 1948, c. 625, § 6 (*o*), 62 Stat. 613. As originally enacted, that section provided exemption for the sole surviving son only "[w]here one or more sons or daughters of a family were killed in action . . . while

[4] The Selective Service System Regulations require the local board to reopen a registrant's classification upon the written request of the State or National Director. 32 CFR § 1625.3 (a) (1969).

[5] After petitioner failed to report for induction the second time, the State Director confirmed that petitioner's father had been killed in action and then requested advice of the National Director. The latter replied that "inasmuch as there is no family, it is not believed that [petitioner] would qualify for sole surviving son status." This information was then communicated to the local board and the case referred to the local United States Attorney. Petitioner's indictment followed.

serving in the armed forces of the United States." In 1964, the section was amended to extend the exemption to sole surviving sons whose fathers were killed in action. 78 Stat. 296. The section now reads in relevant part as follows:

> "[W]here the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces . . . the sole surviving son of such family shall not be inducted for service . . . ." 50 U. S. C. App. § 456 (*o*).

There is no question that petitioner was entitled to an exemption before the death of his mother. The issue is whether her death, and the end of the immediate "family unit," ended that exemption.

We have found no cases discussing this aspect of § 6 (*o*).[6] The applicable Selective Service System Regulation, 32 CFR § 1622.40 (a)(10) (1969), merely repeats the language of the statute. The System's administrative interpretations have not been uniform,[7] although in the present case the National Director took the position that "inasmuch as there is no family, it is not believed that [petitioner] would qualify for sole surviving son status." We must, therefore, decide what is essentially a question of first impression. Our examination of the language and legislative history of § 6 (*o*) indicates that the Selective Service System's interpretation fails to effectuate fully the purposes Congress had in mind in providing the exemption.

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[6] Cf. *Pickens* v. *Cox*, 282 F. 2d 784 (C. A. 10th Cir. 1960).

[7] Shortly after the 1964 amendment, the Selective Service System took the position that a sole surviving son exemption would not be affected by any change in the status of the family, other than the birth of a full brother. Selective Service System Operations Bulletin No. 263 (August 14, 1964). That position was later rescinded and the System has issued no further instructions concerning § 6(*o*).

The language of the statute provides only three conditions, two explicit and one implicit, upon which the exemption should terminate. The registrant may volunteer for service, a national emergency or war may be declared, or, implicitly, the registrant may cease to be the sole surviving son by the birth of a brother. The section says nothing about the continuing existence of a family unit, even though other provisions of the Selective Service laws make similar conditions explicit in other contexts.[8]

The argument for conditioning the exemption upon the continued existence of a family unit is based not upon the language or structure of the statute but upon certain references in the legislative history. These comments indicate that one purpose of the exemption was to provide "solace and consolation" to the remaining family members by guaranteeing the presence of the sole surviving son. See S. Rep. No. 1119, 88th Cong., 2d Sess., 3 (1964); Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2664, 88th Cong., 1st Sess., 3442–3443 (1963). When there is no one left to comfort, it is argued, the sole surviving son may be drafted. However, our examination of the sparse legislative history discloses that Congress

[8] Section 6 (h) of the Military Selective Service Act of 1967, 81 Stat. 102, authorizes the President to provide for the deferment of "persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes." Section 6 (h) of the Selective Service Act of 1948, 62 Stat. 611, was to the same general effect.

Had Congress wished to condition the exemption on the existence of a family unit, it would also seem logical for it to have defined that "family unit." For example, the trial in the present case disclosed that both of petitioner's maternal grandparents and his paternal grandmother were still living. Nothing in the statute indicates whether these relatives should be considered part of the "family."

had not one but several purposes in mind in providing the exemption, only some of which depend upon the existence of a family unit.

Perhaps chief among these other purposes was a desire to avoid extinguishing the male line of a family through the death in action of the only surviving son. See S. Rep. No. 1119, *supra;* Hearing before the Senate Committee on Armed Services on H. R. 2664, 88th Cong., 1st Sess., 30–31 (1963); 110 Cong. Rec. 15218 (1964) (remarks of Senator Keating). Other purposes mentioned were providing financial support for the remaining family members, fairness to the registrant who has lost his father in the service of his country, and the feeling that there is, under normal circumstances, a limit to the sacrifice that one family must make in the service of the country. See Hearing before the Senate Committee on Armed Services on H. R. 2664, *supra,* at 30–31; Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2664, *supra,* at 3442–3443; 109 Cong. Rec. 24889 (1963).

Perhaps the most that can be said in these circumstances is that Congress had multiple purposes in mind in providing an exemption for a sole surviving son. Depriving petitioner of an exemption might not frustrate one of these purposes, but it certainly would frustrate several of the others. Therefore, given the beneficent basis for § 6 (*o*), we cannot believe that Congress intended to make one factor, the existence of a "family unit," crucial. Accordingly, the death of petitioner's mother did not operate to deprive him of his right to be exempt from military service. The local board erred in classifying petitioner I–A and ordering him to report for induction.

III.

The Government maintains, however, that petitioner cannot raise the invalidity of his I–A classification and

subsequent induction order as a defense to a criminal prosecution for refusal to report for induction. According to the Government, petitioner's failure to appeal his reclassification after the death of his mother constitutes a failure to exhaust available administrative remedies and therefore should bar all judicial review. For the reasons set out below, we cannot agree.

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. See generally 3 K. Davis, Administrative Law Treatise § 20.01 *et seq.* (1958 ed., 1965 Supp.); L. Jaffe, Judicial Control of Administrative Action 424–458 (1965). The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938). The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions.[9] Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) (National Labor Relations Act). The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like

[9] See, *e. g.*, Layton & Fine, The Draft and Exhaustion of Administrative Remedies, 56 Geo. L. J. 315, 322–331 (1967).

a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." [10] This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.

Some of these reasons apply equally to cases like the present one, where the administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process. Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers

[10] L. Jaffe, Judicial Control of Administrative Action 425 (1965).

of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

In Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created. At the heart of the Selective Service System are the local boards, which are charged in the first instance with registering and classifying those subject to the Selective Service laws. 32 CFR § 1613.1 *et seq.*, §§ 1621.1–1623.10 (1969). Upon being classified by the local board, the registrant has a right of appeal to a state appeal board, 32 CFR § 1626.2 (1969), and, in some instances, to the President, 32 CFR § 1627.3 (1969). No registrant is required to appeal.[11] A registrant cannot be ordered to report for induction while his classification is being considered by the local board or by an appeal board. 32 CFR §§ 1624.3, 1625.14, 1626.41, 1627.8 (1969).

At some stage during this process, normally shortly before he is expected to be ordered to report for induction, see 32 CFR § 1628.11 (1969), the registrant is required to complete a pre-induction physical examination. If he passes this examination, he ordinarily will be ordered to

[11] The Notice of Classification form, SSS Form 110, informs the registrant of his right to appeal, but does not inform him that failure to appeal may bar a subsequent challenge to the validity of his classification.

report for induction. The next, and last, step is to report to the induction center and submit to induction. At this point, the administrative process is at an end.

If the registrant fails to report for induction, he is, like petitioner in the present case, subject to criminal prosecution. Although the Universal Military Training and Service Act, as it stood at the time of petitioner's trial, provided that the decisions of the local boards were "final," it was long ago established that a registrant charged with failure to report can raise the defense that there was "no basis in fact" for his classification. See *Estep* v. *United States*, 327 U. S. 114, 123 (1946).[12] It is also established that there can be no judicial review at all, with some exceptions, until the registrant has refused to submit to induction and is prosecuted, or else has submitted to induction and seeks release by habeas corpus.[12]

This case raises a different question. We are not here faced with a premature resort to the courts—all admin-

[12] These judicially created doctrines were recently enacted as § 10 (b) (3) of the Military Selective Service Act of 1967, 81 Stat. 104. Section 10 (b) (3) provides in pertinent part:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . . . *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 U. S. C. App. § 460 (b) (3) (1964 ed., Supp. III).

We have recently had occasion to interpret this section in the context of pre-induction challenges to classifications. See *Clark* v. *Gabriel*, 393 U. S. 256 (1968); *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968). We have granted certiorari in *Breen* v. *Selective Service Board*, No. 1144, cert. granted, 394 U. S. 997, to consider the applicability of § 10 (b) (3) to pre-induction challenges to allegedly "punitive" reclassifications.

istrative remedies are now closed to petitioner. We are asked instead to hold that petitioner's failure to utilize a particular administrative process—an appeal—bars him from defending a criminal prosecution on grounds which could have been raised on that appeal. We cannot agree that application of the exhaustion doctrine would be proper in the circumstances of the present case.

First of all, it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review.[13] The statute as it stood when petitioner was reclassified said nothing which would require registrants to raise all their claims before the appeal boards.[14] We must ask, then, whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on petitioner. Even if there is no such compelling interest when petitioner's case is viewed in isolation, we must also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would seriously impair the Selective Service System's ability to perform its functions.

The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely

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[13] See *Yakus* v. *United States*, 321 U. S. 414 (1944).

[14] The 1967 amendment, see n. 12, *supra*, makes no reference to exhaustion of administrative remedies as a prerequisite to challenging the validity of a classification as a defense to a criminal prosecution for refusal to submit to induction. The legislative history of that

one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion.[15] In this sense, the issue is different from many Selective Service classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards.[16] Petitioner's failure to take his claim through all available administrative appeals only deprived the Selective Service System of the opportunity of having

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amendment indicates that Congress was concerned with certain judicial decisions allowing pre-induction review of selective service classifications and the possibility that such "litigious interruption" might seriously affect the administration of the Selective Service System. See *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 245–252 (1968) (dissenting opinion).

[15] Of course, it is necessary that the local board, which has the responsibility of classifying registrants in the first instance, be given the information necessary to perform its function. However, the present case does not present an instance where a registrant is trying to challenge a classification on the basis of facts not presented to the local board. In such a case, the smooth functioning of the system may well require that challenges to classifications based upon facts not properly presented to the board be barred. In the case before us, the board was aware of the relevant facts when it made its decision to reclassify petitioner I–A; no further factual inquiry would have been at all useful.

[16] Conscientious objector claims, Military Selective Service Act of 1967, § 6 (j), 81 Stat. 104, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. III), or deferments for those engaged in activities deemed "necessary to the maintenance of the national health, safety, or interest," *id.*, § 6 (h) (2), 81 Stat. 102, 50 U. S. C. App. § 456 (h) (2) (1964 ed., Supp. III), would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew. 32 CFR § 1626.26. The Selective Service System is empowered by Congress to make such discretionary determinations and only the local and appeal boards have the necessary expertise. See *Thompson* v. *United States*, 380 F. 2d 86 (C. A. 10th Cir. 1967).

its appellate boards resolve a question of statutory interpretation. Since judicial review would not be significantly aided by an additional administrative decision of this sort, we cannot see any compelling reason why petitioner's failure to appeal should bar his only defense to a criminal prosecution.[17] There is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution.[18]

We are thus left with the Government's argument that failure to require exhaustion in the present case will induce registrants to bypass available administrative remedies. The Government fears an increase in litigation and a consequent danger of thwarting the primary function of the Selective Service System, the rapid mobilization of manpower. This argument is based upon the proposition that the Selective Service System will, through its own processes, correct most errors and thus avoid much litigation. The exhaustion doctrine is assertedly necessary to compel resort to these processes. The Government also speculates that many more registrants will risk criminal prosecution if their claims need not carry into court the stigma of denial not only by their local boards, but also by at least one appeal board.

We do not, however, take such a dire view of the likely consequences of today's decision. At the outset, we

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[17] As noted above, the Selective Service System is not without power to correct its own errors without the intervention of the registrant. See nn. 4 and 5, *supra*.

[18] It is true that we recently made specific reference to the exhaustion doctrine in *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 235–236, n. 5 (1968), a case where all administrative appeals had been exhausted. However, that case involved an attempt to challenge the validity of a classification before receipt of a notice of induction. A registrant's failure to appeal may have different implications if raised in a suit for pre-induction review.

doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chances with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classifications. And, today's holding does not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court. Moreover, we are not convinced that many in this rather small class of registrants will bypass the Selective Service System with the thought that their ultimate chances of success in the courts are enhanced thereby. In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction. Accordingly, in the present case, where there appears no significant interest to be served in having the System decide the issue before it reaches the courts, we do not believe that petitioner's failure to appeal his classification should foreclose all judicial review.

We do not view the cases of *Falbo* v. *United States*, 320 U. S. 549 (1944), and *Estep* v. *United States*, 327 U. S. 114 (1946), insofar as they concern the exhaustion doctrine, as a bar to today's holding. Neither those two cases, nor any of the other cases decided by this Court,[19]

[19] See *Billings* v. *Truesdell*, 321 U. S. 542, 558 (1944); *Gibson* v. *United States*, 329 U. S. 338, 349–350 (1946); *Sunal* v. *Large*, 332 U. S. 174, 176 (1947); *Cox* v. *United States*, 332 U. S. 442, 445, 448 (1947).

stand for the proposition that the exhaustion doctrine must be applied blindly in every case. Indeed, those cases all involved ministerial or conscientious objector claims, claims that may well have to be pursued through the administrative procedures provided by the Selective Service laws.[20]

IV.

Finally, we are faced with the argument that petitioner's challenge to the validity of his classification is barred by his failure to report for and pass his pre-induction physical, thus giving the System one last chance to reject him. The Government points to the fact that large numbers of registrants are rejected for physical and mental reasons, and asserts that many criminal trials would be rendered unnecessary if registrants were required to report for a physical before being allowed to challenge their classifications.

We think there are several answers to this argument. First, as we said above, we doubt very much whether very many registrants would pass up the chance to escape service by reason of physical or mental defects and leap immediately at the chance to defend a criminal prosecution. But more importantly, a registrant is under a duty to comply with the order to report for a physical examination [21] and may be criminally prosecuted for failure to comply.[22] If the Government deems it important enough to the smooth functioning of the System to have unfit registrants weeded out at the earliest possible moment, it can enforce the duty to report for pre-induction examinations by criminal sanctions. In the present case, it has not chosen to do so. Petitioner has not been prosecuted for failure to report for his examination; he has been prosecuted for failure to report for induction, a duty

[20] See n. 16, *supra*.

[21] See 32 CFR §§ 1628.10, 1628.11 (1969).

[22] See n. 1, *supra*.

he claims he did not have. Therefore, we hold that petitioner's failure to report for his examination should not bar him from challenging the validity of his classification as a defense to his criminal prosecution.

We do not regard *Falbo* v. *United States, supra,* as a bar to this holding. *Falbo* involved an attempt to raise the invalidity of a registrant's classification as a defense to a criminal prosecution for failure to report to a civilian work camp. The Court noted that the defendant had not reported to the work camp and thus had not given the Selective Service System the opportunity to reject him for physical or mental reasons. According to the Court, the "narrow question . . . presented . . . [was] whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." 320 U. S., at 554. The Court held that Congress had not authorized such review.

Falbo was limited by *Estep* v. *United States, supra,* which held that a registrant could secure limited judicial review of his classification in a criminal prosecution for failure to report if he had pursued his administrative remedies to an end. In *Estep,* the registrant had reported, had been accepted for induction, but had refused to be inducted.

The holding of the Court in *Falbo* was based in part on a fear of litigious interruption of the Selective Service System. We have dealt with that problem in other cases. See *Clark* v. *Gabriel,* 393 U. S. 256 (1968); *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968). It is not presented here. As noted above, the administrative process in this case is at an end.

Finally, the Court in *Falbo* was concerned with the possibility that a registrant might be rejected for physical or mental reasons, thus making a criminal prosecution

unnecessary. But, as we have seen, the Selective Service System has ample means to ensure that the great majority of registrants will report for their pre-induction examinations. At the time *Falbo* was decided the regulations provided that the pre-induction examination was to be given at the time the registrant responded to the order to report for induction or to the work camp. See *Gibson* v. *United States*, 329 U. S. 338 (1946). Accordingly, the Selective Service System had no way to enforce the duty to report for an examination other than by a prosecution for failure to report for induction. An invalid classification, if allowed to be raised, would have been a complete defense to that prosecution; it would not be a defense today to a prosecution for failure to report for a pre-induction examination.

We hold that petitioner's failure to appeal his classification and failure to report for his pre-induction physical do not bar a challenge to the validity of his classification as a defense to his criminal prosecution for refusal to submit to induction. We also hold that petitioner was entitled to exemption from military service as a sole surviving son. Accordingly, we reverse the judgment of the court below and remand the case for entry of a judgment of acquittal.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

The principle of *Oestereich* v. *Selective Service Board*, 393 U. S. 233, should dispose of this case. There a registrant was plainly entitled to a statutory exemption from service because he was a divinity student. Yet he was denied the exemption because, having burned his draft card, he was classified as a "delinquent" by Selective Service. He challenged that action in a civil suit for pre-induction review; and we granted relief.

This is not a suit for pre-induction review, but a defense tendered in a criminal prosecution. This statutory

exemption is as clear as the one in *Oestereich*. The "sole surviving" son of a family whose father had been killed in action is exempt and there can hardly be any argument that petitioner is such a "son" though both his father and mother are dead. He is indeed the last male heir of the line and therefore one who Congress charitably decided should not be exposed to the chance of death in warfare.

If Oestereich could raise his claim to statutory exemption in a civil suit at a pre-induction stage, it follows *a fortiori* that petitioner can do so in a criminal prosecution for failure to obey the Act's mandate.

The truth of the matter is that it was the Selective Service Board that acted in a "lawless" manner;* and when its error is so egregious, it would be a travesty of justice to require a registrant—whether or not sophisticated—to pursue the administrative remedies that are designed for quite different categories of cases.

MR. JUSTICE WHITE, concurring in the result.

The Court's opinion, as I understand it, does not dispense with the necessity of presenting an issue under the draft laws to the registrant's local board for consideration in the first instance. Petitioner did exactly this, and by its decision, the Court provides no avenue for totally bypassing the Selective Service System and using the courts as an alternative to the local draft boards. Any decision to the contrary would be inconsistent with the well-established principle that the responsible admin-

*While questions of law are usually routed through the available administrative machinery (see *Udall* v. *Tallman*, 380 U. S. 1, 16), that principle evolved under regulatory schemes where agencies had general oversight and supervision over companies or other groups of individuals. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51. Arguably, these Selective Service boards have no claim to that kind of expertise. But assuming that they do, the present "legal" question is too transparent to be dignified in that manner.

istrative agency must be given "an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 155 (1946). See generally 3 K. Davis, Administrative Law Treatise § 20.06 (1958). But presentation of the issue to the agency for consideration in the first instance does not complete the litigant's task under the exhaustion doctrine if he would seek resolution of that same issue in the courts. On the contrary, he must resort to appellate remedies available within the agency, and only after those remedies have been exhausted can he turn to the courts for review. See, *e. g.*, *United States* v. *Sing Tuck*, 194 U. S. 161 (1904); *Chicago, M., St. P. & P. R. Co.* v. *Risty*, 276 U. S. 567, 575 (1928).

It is petitioner's failure to exhaust appellate remedies available within the Selective Service System which presents the obstacle to the challenge of his classification in the courts. And while this facet of the exhaustion doctrine, like its other facets, admits of exceptions when special circumstances warrant, see, *e. g.*, *Donato* v. *United States*, 302 F. 2d 468 (C. A. 9th Cir. 1962), I cannot agree with the Court's apparent conclusion that petitioner's failure to exhaust appellate remedies within the System can be disregarded on the broader ground that only a question of law is involved. Questions of law have not, in the past, been thought to be immune from exhaustion requirements. See, *e. g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Indeed, this Court has often emphasized that the expertise of the responsible agency is entitled to great deference in matters of statutory construction,[1] see, *e. g.*, *Udall* v. *Tallman*,

[1] The fact that the relevant statute is ambiguous or uncertain, *e. g.*, *Logan* v. *Davis*, 233 U. S. 613, 627 (1914), or that the agency's interpretation of a statute comes while its interrelationship with the other parts of the regulatory scheme is as yet "untried and

380 U. S. 1, 16 (1965), thus refuting any contention that questions of law are somehow beyond the expertise of the agency and do not give rise to the considerations which underlie the exhaustion doctrine.

Although I would stop far short of the broad strokes used by the Court in this respect, I do agree that petitioner's failure to exhaust appellate remedies does not bar review of his classification on the facts of this case. Undoubtedly, Congress could require such exhaustion as a prerequisite to judicial review, see, *e. g., Yakus* v. *United States,* 321 U. S. 414 (1944), but Congress has not chosen to do so.[2] In the absence of any such requirement, I do

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new," *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U. S. 294, 315 (1933), may accord the agency interpretation of the statute additional significance. And since the construction of the sole surviving son exemption is "essentially a question of first impression," *ante,* at 190, the importance of exhaustion—or of a failure to exhaust—is, perhaps, accentuated in this case. Any ambiguity in the language and legislative history of the statute, or any question as to the role which § 6 (*o*) must play in the statutory scheme would be well suited to resolution by the Selective Service System in the first instance. Exhaustion of appellate remedies within the System would have afforded that agency full opportunity to apply its expertise to these and other questions, thereby facilitating the disclosure of factors which, although germane, are not highly visible to tribunals less familiar with the regulatory scheme.

[2] Compare *Falbo* v. *United States,* 320 U. S. 549 (1944). Section 10 (b) (3) of the Military Selective Service Act of 1967, 81 Stat. 104, prescribes the timing of judicial review—"after the registrant has responded either affirmatively or negatively to an order to report for induction"—but does not speak to the exhaustion question.

It should be noted that where agency orders are not suspended during the pendency of an administrative appeal, Congress has seen fit to permit judicial review without exhaustion of appellate remedies. Administrative Procedure Act § 10 (c), 5 U. S. C. § 704 (1964 ed., Supp. III). Under that section, however, if the agency action is inoperative during administrative review, the agency may require exhaustion by its own rules. Since induction may not be ordered during a registrant's appeal, 32 CFR §§ 1626.41, 1627.8 (1969), the

not think review of petitioner's classification is an impermissible encroachment upon the bailiwick of the Selective Service System. We are not faced with a situation in which consideration of the issue involved has stopped at the first level of the administrative machinery. Rather, petitioner's case and the scope of the § 6 (*o*) exemption for sole surviving sons have received the attention of both the State and the National Directors of the Selective Service System. Petitioner has not exhausted the channels for formal appellate review within the System, but the informal review given petitioner's case and the ratification by the State and National Directors of the position taken by petitioner's local board are sufficient justification to permit the courts to entertain petitioner's defense that his classification is improper under § 6 (*o*).

Selective Service System could require exhaustion even if subject to § 10 (c) of the APA. The administration of the draft laws, however, is not covered by the APA, and the necessity for exhausting appellate remedies would seem to rest on the general doctrine developed by the courts.

PEREZ *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 39. Argued November 14, 1968.—Decided May 26, 1969.

65 Cal. 2d 615, 422 P. 2d 597, dismissed.

Peter G. Fetros, by appointment of the Court, 393 U. S. 812, argued the cause and filed a brief for petitioner.

Edsel W. Haws, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch*, Attorney General, and *Doris H. Maier*, Assistant Attorney General.

PER CURIAM.

The writ is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS dissents from the dismissal of the writ.

MATTIELLO *v.* CONNECTICUT.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF CONNECTICUT.

No. 150. Argued December 11, 1968.—Decided May 26, 1969.

4 Conn. Cir. 55, 225 A. 2d 507, appeal dismissed.

Robert N. Grosby argued the cause for appellant. With him on the briefs was *Joseph D. Harbaugh.*

George F. Carroll, Jr., argued the cause and filed a brief for appellee.

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* O'CONNELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 158. Argued January 14, 1969.—Decided May 26, 1969.*

No. 158, 391 F. 2d 156; No. 172, 391 F. 2d 289, vacated and remanded.

Arnold B. Elkind argued the cause and filed a brief for petitioners in No. 158. *David Leo Uelmen* argued the cause for petitioners in No. 172. With him on the briefs were *David Previant, John J. Naughton, James P. Reedy,* and *Gerry M. Miller.*

Lee Leibik argued the cause for respondents in each case. With him on the briefs was *Ruth Weyand.*

Harold A. Ross filed briefs for the Brotherhood of Locomotive Engineers as *amicus curiae* urging reversal in both cases.

Harold C. Heiss filed a brief for the Brotherhood of Locomotive Firemen & Enginemen as *amicus curiae* urging affirmance in both cases.

PER CURIAM.

The judgments are vacated and the cases are remanded to the respective district courts with instructions to dismiss the cases as moot.

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*Together with No. 172, *Dirks et al.* v. *Birkholz et al.*, on certiorari to the United States Court of Appeals for the Seventh Circuit.

SHAW *v.* CALIFORNIA.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1245. Decided May 26, 1969.

Appeal dismissed and certiorari denied.

Irving A. Kanarek for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

LOPO *v.* SAKS FIFTH AVENUE.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1257. Decided May 26, 1969.

Appeal dismissed and certiorari denied.

Robert E. Dunne for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

EVERHARDT ET AL. *v.* CITY OF NEW ORLEANS ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1284. Decided May 26, 1969.

253 La. 285, 217 So. 2d 400, appeal dismissed and certiorari denied.

William F. Wessel for appellants.

Alvin J. Liska for appellees.

John A. Eckler filed a brief for the American Motorcycle Assn. as *amicus curiae*.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JENKINS *v.* DELAWARE.

CERTIORARI TO THE SUPREME COURT OF DELAWARE.

No. 748. Argued March 5, 1969.—Decided June 2, 1969.

The standards which this Court established in *Miranda* v. *Arizona*, 384 U. S. 436, for determining the admissibility into evidence of in-custody statements do not apply to persons whose retrials have commenced after the date of that decision if their original trials had begun before that date. Cf. *Johnson* v. *New Jersey*, 384 U. S. 719. Pp. 213–222.

— Del. —, 240 A. 2d 146, affirmed.

Henry N. Herndon, Jr., argued the cause and filed a brief for petitioner.

Jay H. Conner, Deputy Attorney General of Delaware, argued the cause and filed a brief for respondent.

A brief as *amicus curiae* urging reversal was filed for Henry A. Vigliano.

Louis J. Lefkowitz, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Amy Juviler*, Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), we held that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), "applies only to cases in which the trial began after the date of our [*Miranda*] decision . . . ." 384 U. S., at 721. In this case, we must decide whether *Miranda*'s standards for determining the admissibility of in-custody statements apply to post-*Miranda* retrials[1] of cases

[1] The word "retrial" is used in this opinion to refer only to a subsequent trial of a defendant whose original trial for the same conduct commenced prior to June 13, 1966, the day on which *Miranda* was announced.

originally tried prior to that decision.[2] We hold that they do not.

Petitioner was arrested on the morning of March 17, 1965, as a murder suspect, and was interrogated on three separate occasions, at 11:30 a. m., 2:50 p. m., and 7:05 p. m. Although indigent, he was not advised that he had the right to have an attorney present at the State's expense. Approximately 10 minutes after the evening interrogation began, petitioner gave the police a statement in which he admitted struggling with the victim during a burglary the preceding evening.

Petitioner's first trial commenced on January 13, 1966. He did not take the stand, but his incriminating statement was admitted into evidence. The jury found him guilty of murder in the first degree and burglary in the fourth degree. Disregarding the jury's recommendation, the trial court sentenced him to death. During the pendency of petitioner's appeal to the Supreme Court of Delaware, we decided *Miranda* and *Johnson*. In reversing petitioner's conviction on various state grounds, the Delaware Supreme Court also determined, *sua sponte*, that under *Johnson* petitioner's statement, which was obtained without fully advising him of his constitutional rights, would be admissible at his retrial. — Del. —, 230 A. 2d 262 (1967). It reasoned that the retrial would be a mere continuation of the case originally commenced prior to our decision in *Miranda*.

Petitioner's second trial began on October 2, 1967. He was convicted of second degree murder and sentenced to life imprisonment. The Supreme Court of Delaware affirmed, again rejecting petitioner's argument that under *Johnson* his incriminating statement was inadmissible at his retrial. — Del. —, 240 A. 2d 146 (1968). Because

[2] Petitioner's remaining contentions have been adequately resolved by the court below. See *Jenkins* v. *State*, — Del. —, 230 A. 2d 262 (1967), and *Jenkins* v. *State*, — Del. —, 240 A. 2d 146 (1968).

of a disagreement among state courts over this issue,[3] we granted certiorari. 393 U. S. 950 (1968). For the reasons stated below, we affirm.

Petitioner and the decisions he relies upon [4] emphasize our references in *Johnson* to "trials" commenced before the date *Miranda* was decided and our stated concern for the reliance placed on pre-*Miranda* standards by trial courts as well as by law enforcement officers. Peti-

[3] At least eight States, including Delaware, decline to apply *Miranda* to post-*Miranda* retrials of cases originally tried prior to that decision. See *People* v. *Worley*, 37 Ill. 2d 439, 227 N. E. 2d 746 (1967) (dictum); *Boone* v. *State*, 3 Md. App. 11, 237 A. 2d 787 (Md. Ct. Sp. App.) (dictum), cert. to Md. Ct. App. denied, 393 U. S. 872 (1968); *Chapman* v. *State*, 282 Minn. 13, 162 N. W. 2d 698 (1968); *State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967) (dictum); *People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (1968); *State* v. *Lewis*, 274 N. C. 438, 164 S. E. 2d 177 (1968) (dictum); *Murphy* v. *State*, 221 Tenn. 351, 426 S. W. 2d 509 (1968).

At least nine other States have indicated in dicta that *Miranda* should be applied to such retrials. See *Smith* v. *State*, 282 Ala. 268, 210 So. 2d 826 (1968); *State* v. *Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966); *People* v. *Doherty*, 67 Cal. 2d 9, 429 P. 2d 177 (1967); *State* v. *Ruiz*, 49 Haw. 504, 421 P. 2d 305 (1966); *Dell* v. *State*, 249 Ind. 231, 231 N. E. 2d 522 (1967); *State* v. *McCarther*, 197 Kan. 279, 416 P. 2d 290 (1966); *Creech* v. *Commonwealth*, 412 S. W. 2d 245 (Ct. App. Ky. 1967); *State* v. *Shoffner*, 31 Wis. 2d 412, 143 N. W. 2d 458 (1966). In *State* v. *Bradshaw*, 101 R. I. 233, 237, n. 1, 221 A. 2d 815, 817, n. 1 (1966), the court expressly declined to pass on the issue in an opinion reversing a conviction on other grounds, but it nevertheless suggested that under *Johnson* the defendant's statement might not be admissible at his retrial.

The United States Court of Appeals for the Seventh Circuit has held *Miranda* applicable, *United States* v. *Phillips*, 401 F. 2d 301 (C. A. 7th Cir. 1968); and that holding is supported by dicta in at least three other circuits. See *United States* v. *Young*, 388 F. 2d 675 (C. A. 9th Cir. 1968); *Virgin Islands* v. *Lovell*, 378 F. 2d 799, 802, n. 4 (C. A. 3d Cir. 1967); *Gibson* v. *United States*, 363 F. 2d 146 (C. A. 5th Cir. 1966). Without discussion, the Fourth Circuit appears to have reached a contrary result by implication. *Moorer* v. *South Carolina*, 368 F. 2d 458 (C. A. 4th Cir. 1966).

[4] *E. g.*, *United States* v. *Phillips*, *supra*; *People* v. *Doherty*, *supra*.

tioner argues that this "studied" focus on the trial process indicates that we intended *Miranda* to be applied to retrials, which, he insists, begin that process anew. As Delaware correctly points out, however, more than once we stated our holding in *Johnson* in terms of "cases" commenced before the date of *Miranda*. See 384 U. S., at 733. Delaware and the authorities it relies upon [5] argue that, since the word "case" usually incorporates all the judicial proceedings against an accused, a retrial is not the "commencement" of a case. Delaware also quotes our statement that only "[f]uture defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test." *Id.*, at 732. Delaware suggests that petitioner, who was tried six months before *Miranda*, cannot be regarded as a "future" defendant within the meaning of *Johnson*. That there is language in *Johnson* supporting the positions of both petitioner and respondent demonstrates what some courts and commentators have readily recognized: in that decision, we did not consider the applicability of *Miranda* to retrials.[6] The issue simply was not presented.

Petitioner buttresses his interpretation of *Johnson* by arguing that *Miranda* must be applied to retrials in order to insure the uniform treatment of individuals similarly situated. If it is not applied, he points out, it is possible that different standards for the protection of constitutional rights could be applied to two defendants simultaneously tried in the same courthouse for similar

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[5] *E. g., People* v. *Worley, supra; State* v. *Vigliano, supra.*

[6] *E. g., Smith* v. *State, supra; People* v. *Worley, supra; People* v. *Sayers, supra;* Comment, The Applicability of *Miranda* to Retrials, 116 U. Pa. L. Rev. 316, 320 (1967); Comment, Post-*Miranda* Retrials of Pre-*Miranda* Defendants, 25 Wash. & Lee L. Rev. 108, 109 (1968).

offenses. This anomaly could result if one of the defendants had been previously tried for the same offense prior to *Miranda*. This identical result, however, is also possible under our more recent prospectivity decisions. Because both *Desist* v. *United States*, 394 U. S. 244 (1969), and *Stovall* v. *Denno*, 388 U. S. 293 (1967), selected the date on which the prohibited practice was engaged in, rather than the date the trial commenced, to determine the applicability of newly formulated constitutional standards, those standards do not apply to retrials of defendants originally tried prior to the dates the standards were announced. In fact, under those decisions, different rules could govern where neither defendant had been tried before, depending upon when the condemned practice was engaged in.

Moreover, as petitioner acknowledges, *Johnson* made it quite clear that *Miranda* need not be applied to trials commenced prior to that decision but not yet final when it was announced. On that date, petitioner's case was in precisely that posture. The type of apparent incongruity petitioner urges us to avoid is equally present in refusing to apply *Miranda* to defendants whose cases, like petitioner's, were not final on the date *Miranda* was decided, yet making an exception for petitioner simply because he was afforded a post-*Miranda* retrial for reasons wholly unrelated to the admissibility of his incriminating statement. Nor is petitioner's hypothetical more disconcerting than applying the new standards for in-custody interrogation to Ernesto Miranda while denying them to other defendants whose cases, for wholly fortuitous reasons, simply reached this Court at a later date, although the defendants in those cases may have been both interrogated and tried after Ernesto Miranda.

In short, petitioner's concern for what he refers to as "visible imperfection[s] in a judicial process" merely

highlights the problem inherent in prospective decision-making, *i. e.*, some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected. Thus, raising the specter of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of a newly formulated constitutional principle.

Once the need is established for applying the principle prospectively, as the Supreme Court of New Jersey has pointed out, "there is a large measure of judicial discretion involved in deciding . . . the time from which the new principle is to be deemed controlling." *State* v. *Vigliano*, 50 N. J. 51, 65–66, 232 A. 2d 129, 137 (1967). In our more recent decisions in this area, we have regarded as determinative the moment at which the discarded standards were first relied upon. See, *e. g.*, *Desist* v. *United States*, *supra*; *Stovall* v. *Denno*, *supra*. The point of reliance is critical, not because of any constitutional compulsion, but because it determines the impact that newly articulated constitutional principles will have upon convictions obtained pursuant to investigatory and prosecutorial practices not previously proscribed. See *Johnson* v. *New Jersey*, *supra*, at 733. See generally Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967).[7]

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[7] Our initial approach to prospective decision-making has undergone some modification. Compare *Linkletter* v. *Walker*, 381 U. S. 618 (1965), with *Desist* v. *United States*, 394 U. S. 244 (1969). With *Johnson* we began placing increasing emphasis upon the point at which law enforcement officials relied upon practices not yet proscribed; and, more recently, we have selected the point of initial

In *Johnson*, after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. We of course could have applied *Miranda* to all judgments not yet final, although they were obtained in good-faith reliance upon constitutional standards then applicable. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). As we pointed out, however, that choice "would [have] impose[d] an unjustifiable burden on the administration of justice." 384 U. S., at 733. On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See Schaefer, *supra*, at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden

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reliance. See, *e. g.*, *Desist* v. *United States*, *supra*; *Stovall* v. *Denno*, *supra*. In addition to being more consistent with the fundamental justification for not applying newly enunciated constitutional principles retroactively, this latest approach has obviated at least one administrative problem, the treatment of retrials. Our experience, therefore, has confirmed Mr. Justice Schaefer's observation: "Sound growth can be promoted and erratic results avoided by focusing attention on the element of reliance that justifies the technique. Even when that is done there will not always be agreement as to the quality or degree of reliance that justifies a particular prospective limitation. But the area of disaffection will be narrowed if time before and time after are measured from the moment of reliance." Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631, 646 (1967).

would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*.

This same concern for the justifiable reliance of law enforcement officials upon pre-*Miranda* standards militates against applying *Miranda* to retrials, which would place a much heavier burden upon prosecutors to compensate for the inadmissibility of incriminating statements obtained and admitted into evidence pursuant to practices not previously proscribed. See, *e. g.*, *State* v. *Vigliano*, *supra*; *People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (1968); Comment, The Applicability of *Miranda* to Retrials, 116 U. Pa. L. Rev. 316, 324–325 (1967). As we stated in *Stovall*, "[I]nquiry would be handicapped by the unavailability of witnesses and dim memories." 388 U. S., at 300. The burden would be particularly onerous where an investigation was closed years prior to a retrial because law enforcement officials relied in good faith upon a strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case.[8] Moreover, we cannot assume that applying *Miranda* to retrials would affect only a small number of cases. It could, for example, render significantly more difficult the prosecutions of defendants, some of whom may have been convicted many years ago, who are afforded retrials because their convictions were obtained in violation of recently articu-

[8] In one recent case, for example, in which the court refused to apply *Miranda* to the defendant's retrial, it noted: "The investigation of this brutal assault and the interrogation of defendant began in January 1955—more than 12 years previous to this retrial. The evidence is clear that in 1955 defendant was warned of his constitutional rights in accordance with the requirements then prevailing." *State* v. *Lewis*, 1 N. C. App. 296, 297–298, 161 S. E. 2d 497, 499 (1968).

lated constitutional principles that are fully retroactive. See, *e. g., Berger* v. *California,* 393 U. S. 314 (1969); *Roberts* v. *Russell,* 392 U. S. 293 (1968). Such a decision could also pose a serious obstacle to the successful prosecution of an undetermined number of defendants whose pre-*Miranda* convictions are reversed because of errors under federal or state law that do not even constitute constitutional violations.[9]

In determining how much weight to give the increased evidentiary burden that would result if we were to insist that *Miranda* be applied to retrials, we must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants. As we pointed out in *Johnson,* an individual who cannot claim the benefits of *Miranda* may still resort to whatever state and federal procedures are available to insure that statements admitted against him were made voluntarily. Moreover, he may invoke a "substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous . . . , [taking] specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance." 384 U. S., at 730. As a result, not applying *Miranda* to retrials will not preclude the invocation of "the same safeguards as part of an involuntariness claim." *Ibid.* Thus, because of the increased evidentiary burden that would be placed unreasonably upon law enforcement officials by insisting that *Miranda* be applied to retrials, and for all the reasons we gave in *Johnson* for not applying *Miranda* retroactively, we hold

[9] See, *e. g., United States* v. *Phillips, supra* (discretion abused by admitting unduly "prejudicial" evidence); *State* v. *Ruiz, supra* ("plain error" in trial court's fact finding); *Boone* v. *State, supra* (insufficient corroboration of accomplice's testimony).

that *Miranda* does not apply to any retrial[10] of a defendant whose first trial commenced prior to June 13, 1966.

Accordingly, the judgment of the Supreme Court of Delaware is *Affirmed.*

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissents for the reasons stated in his dissenting opinions in *Linkletter* v. *Walker*, 381 U. S. 618, 640, and *Johnson* v. *New Jersey*, 384 U. S. 719, 736.

MR. JUSTICE HARLAN, dissenting.

As one who has never agreed with the *Miranda* case but nonetheless felt bound by it,* I now find myself in the uncomfortable position of having to dissent from a holding which actually serves to curtail the impact of that decision.

I feel compelled to dissent because I consider that the new "retroactivity" ruling which the Court makes today is indefensible. Were I free to do so, I would hold that this petitioner is entitled to the benefits of *Miranda*, this case being before us on direct review and being one which had not become final prior to the decision of *Miranda*. See my dissenting opinion in

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[10] For purposes of this holding, it is immaterial whether state law treats a retrial as the continuation of the original trial, see, *e. g.*, *People* v. *Worley*, *supra*, or as a completely new trial that proceeds as if the former trial never occurred. See, *e. g.*, *State* v. *Brock*, *supra*. What is determinative is that the defendant is being tried for the same conduct that was the subject of a previously reversed conviction. A State is free, of course, for any reason it finds persuasive, to apply *Miranda* to a subsequent trial of a defendant whose original trial commenced prior to that decision. See *Johnson* v. *New Jersey*, *supra*, at 733.

*See my dissenting opinion in *Miranda* v. *Arizona*, 384 U. S. 436, 504 (1966), and my concurring opinion in *Orozco* v. *Texas*, 394 U. S. 324, 327 (1969).

Desist v. *United States*, 394 U. S. 244, 256 (1969); *Linkletter* v. *Walker*, 381 U. S. 618 (1965). But since as to the retroactivity issue I am also bound by *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), I must judge that issue within the confines of *Johnson*, which does not appear to have been overruled by what was done in *Desist* v. *United States*, *supra*.

In the *Johnson* case we held that the "guidelines" of *Miranda* should apply to all "persons whose trials had not begun as of June 13, 1966," 384 U. S., at 734, the date on which *Miranda* was handed down. Today, however, the Court holds that *Miranda* does not apply to persons whose *retrials* have commenced after that date, if the original trial had begun before *Miranda* was decided. I find it quite impossible to discern in the rationale of *Johnson* any solid basis for the distinction now drawn.

The Court states that the retroactivity rule adopted in *Johnson* was "an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted." *Ante*, at 219. I too believe that a desire not to interfere with trials which were concluded or already under way at the time of *Miranda* lay at the core of what was done in *Johnson*. See 384 U. S., at 732–735. But that rationale would seem to require application of *Miranda* to subsequent retrials, rather than the contrary result mandated by the Court. When a defendant has had his pre-*Miranda* conviction set aside on other than *Miranda* grounds and is being retried, there is by hypothesis no "conviction . . . validly obtained" which might be "needlessly aborted" by application of the *Miranda* standards. There is no ongoing trial in which the prosecution's strategy might have been premised on pre-*Miranda* confession rules.

I am also left wholly unpersuaded by the Court's statement that application of *Miranda* to retrials would impose an intolerable "evidentiary burden" on prosecutors, for the Court ignores the fact that *Miranda* will impose a very similar burden whenever a defendant's *first* trial has for one reason or another been substantially delayed and its commencement carried beyond the *Johnson* cut-off date.

Apart from the two propositions just discussed, the Court offers nothing in justification of its trial-retrial distinction beyond the general observation that the retroactivity "technique" necessarily entails "incongruities" which must be tolerated because of "the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Ante*, at 218. But surely it is incumbent upon this Court to endeavor to keep such incongruities to a minimum. This in my opinion can only be done by turning our backs on the *ad hoc* approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle. See my dissenting opinion in *Desist, supra*. What is done today leads me again, see *ibid.*, to urge that the time has come for us to take a fresh look at the whole problem of retroactivity.

I would reverse the judgment of the Supreme Court of Delaware. It would be less than frank were I not to say that I cast this vote with reluctance, feeling as I do about the unsoundness of *Miranda*.

UNITED STATES *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 798. Argued April 28, 1969.—Decided June 2, 1969.*

This action was commenced in May 1964 to obtain integration in the Montgomery County, Alabama, public schools. The District Judge issued his initial order in 1964 requiring integration of certain grades and followed this by yearly proceedings, with reports by the school board and hearings, opinions, and court orders. The 1968 court order dealt, among other things, with faculty and staff desegregation and provided that the school board must move toward a goal whereby "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." A panel of the Court of Appeals modified the order. A petition for rehearing *en banc* was denied by an equally divided Court of Appeals. *Held:* The District Judge's order is approved as written by him. Pp. 231–237.

400 F. 2d 1, reversed and remanded.

Solicitor General Griswold argued the cause for the United States in No. 798. With him on the brief were *Assistant Attorney General Leonard* and *Deputy Assistant Attorney General Lewin. Jack Greenberg* argued the cause for petitioners in No. 997. With him on the brief were *Fred D. Gray, James M. Nabrit III, Melvyn Zarr, Franklin E. White,* and *Elizabeth B. DuBois.*

Joseph D. Phelps argued the cause and filed a brief for respondents in both cases.

MR. JUSTICE BLACK delivered the opinion of the Court.

In this action the United States District Court at Montgomery, Alabama, ordered the local Montgomery County Board of Education to bring about a racial desegregation

*Together with No. 997, *Carr et al.* v. *Montgomery County Board of Education et al.*, also on certiorari to the same court.

of the faculty and the staff of the local county school system. 289 F. Supp. 647 (1968). Dissatisfied with the District Court's order, the board appealed. A panel of the Court of Appeals affirmed the District Court's order but, by a two-to-one vote, modified it in part, 400 F. 2d 1 (1968).[1] A petition for rehearing *en banc* was denied by an evenly divided court, six to six, thereby leaving standing the modifications in the District Court's order made by the panel.[2] On petitions of the United States as intervenor below in No. 798, and the individual plaintiffs in No. 997, we granted certiorari. 393 U. S. 1116 (1969).

Fifteen years ago, on May 17, 1954, we decided that segregation of the races in the public schools is unconstitutional. *Brown* v. *Board of Education*, 347 U. S. 483 (*Brown I*). In that case we left undecided the manner in which the transition from segregated to unitary school systems would be achieved, and set the case down for another hearing, inviting the Attorney General of the United States and the Attorneys General of the States providing for racial segregation in the public schools to present their views on the best ways to implement and enforce our judgment. We devoted four days to the argument on this single problem, and all the affected parties were given the opportunity to present their views at length. After careful consideration of the many viewpoints so fully aired by the parties, we announced our decision in *Brown II*, 349 U. S. 294 (1955). We held that the primary responsibility for abolishing the system of segregated schools would rest with the local school authorities. In some of the States that argued before us, the laws permitted but did not require racial segregation,

[1] The dissent from the original panel opinion is reported at 402 F. 2d 782.

[2] The dissents from the denial *en banc* of the petition for rehearing are reported at 402 F. 2d, at 784, 787.

and we noted that in some of these States "substantial steps to eliminate racial discrimination in public schools have already been taken . . . ." *Id.*, at 299. Many other States had for many years maintained a completely separate system of schools for whites and nonwhites, and the laws of these States, both civil and criminal, had been written to keep this segregated system of schools inviolate. The practices, habits, and customs had for generations made this segregated school system a fixed part of the daily life and expectations of the people. Recognizing these indisputable facts, we neither expected nor ordered that a complete abandonment of the old and adoption of a new system be accomplished overnight. The changes were to be made "at the earliest practicable date" and with "all deliberate speed." *Id.*, at 300, 301. We were not content, however, to leave this task in the unsupervised hands of local school authorities, trained as most would be under the old laws and practices, with loyalties to the system of separate white and Negro schools. As we stressed then, "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.*, at 300. The problem of delays by local school authorities during the transition period was therefore to be the responsibility of courts, local courts so far as practicable, those courts to be guided by traditional equitable flexibility to shape remedies in order to adjust and reconcile public and private needs. These courts were charged in our *Brown II* opinion, *id.*, at 300, with a duty to:

> "require that the defendants [local school authorities] make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests

upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

The record shows that neither Montgomery County nor any other area in Alabama voluntarily took any effective steps to integrate the public schools for about 10 years after our *Brown I* opinion. In fact the record makes clear that the state government and its school officials attempted in every way possible to continue the dual system of racially segregated schools in defiance of our repeated unanimous holdings that such a system violated the United States Constitution.[3]

There the matter stood in Alabama in May 1964 when the present action was brought by Negro children and their parents, with participation by the United States as *amicus curiae*. Apparently up to that time Montgomery County, and indeed all other schools in the State, had operated, so far as actual racial integration was concerned, as though our *Brown* cases had never been decided. Obviously voluntary integration by the local school officials in Montgomery had not proved to be even partially successful. Consequently, if Negro children of school age were to receive their constitutional rights as we had declared them to exist, the coercive assistance of courts was imperatively called for. So, after preliminary procedural matters were disposed of, answers filed, and issues joined, a trial took place. On July 31, 1964, District Judge Johnson handed down an opinion and entered an

[3] A substantial part of the history of the continued support by Alabama's governor and other state officials for its dual system of schools, completely separating white and nonwhite students, faculty, and staff, can be found in the opinion of the three-judge court for the Middle District of Alabama in *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (1967), affirmed by this Court under the title of *Wallace* v. *United States*, 389 U. S. 215 (1967).

order. 232 F. Supp. 705. The judge found that at the time:

> "There is only one school district for Montgomery County, Alabama, with the County Board of Education and the Superintendent of Education of Montgomery County, Alabama, exercising complete control over the entire system. In this school system for the school year 1963–64, there were in attendance approximately 15,000 Negro children and approximately 25,000 white children. In this system the Montgomery County Board of Education owns and operates approximately 77 schools.
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> "From the evidence in this case, this Court further specifically finds that, through policy, custom and practice, the Montgomery County Board of Education, functioning at the present time through the named individual defendants, operates a dual school system based upon race and color; that is to say, that, through this policy, practice and custom, these officials operate one set of schools to be attended exclusively by Negro students and one set of schools to be attended exclusively by white students. The evidence further reflects that the teachers are assigned according to race; Negro teachers are assigned only to schools attended by Negro students and white teachers are assigned only to schools attended by white students." 232 F. Supp., at 707.

Based on his findings, Judge Johnson ordered that integration of certain grades begin in September 1964, but in this first order did not require efforts to desegregate the faculty. The school board, acting under the State's school placement law, finally admitted eight Negro students out of the 29 who had sought transfers to white schools under the judge's July 31 order. The judge refused to order admission of the 21 Negro students

whose transfer applications had been rejected by the school officials.

The 1964 initial order of Judge Johnson was followed by yearly proceedings, opinions, and orders by him.[4] Hearings, preceding these additional orders, followed the filing each year under the judge's direction of a report of the school board's plans for proceeding with desegregation. These annual reports and orders, together with transcripts of the discussions at the hearings, seem to reveal a growing recognition on the part of the school board of its responsibility to achieve integration as rapidly as practicable. The record, however, also reveals that in some areas the board was not moving as rapidly as it could to fulfill this duty, and the record shows a constant effort by the judge to expedite the process of moving as rapidly as practical toward the goal of a wholly unitary system of schools, not divided by race as to either students or faculty. During these years of what turned out to be an exchange of ideas between judge and school board officials, the judge, from time to time, found it possible to compliment the board on its cooperation with him in trying to bring about a fully integrated school system. Some of these complimentary remarks are set out in the opinion of the Court of Appeals modifying the judge's decree. 400 F. 2d, at 3, n. 3. On the other hand the board did not see eye to eye with Judge Johnson on the speed with which segregation should be wiped out "root and branch" as we have held it must be done. *Green* v. *County School Board*, 391 U. S. 430, 438 (1968). The school board, having to face the "complexities arising from the transition to a system of public education freed of racial discrimination," *Brown II*, 349 U. S., at 299, was constantly sparring for

[4] These orders were reported as follows: May 18, 1965, 10 Race Rel. L. Rep. 582; March 22, 1966, 253 F. Supp. 306; August 18, 1966, 11 Race Rel. L. Rep. 1716; June 1, 1967, 12 Race Rel. L. Rep. 1200.

time; the judge, upon whom was thrust the difficult task of insuring the achievement of complete integration at the earliest practicable date, was constantly urging that no unnecessary delay could be allowed in reaching complete compliance with our mandate that racially segregated public schools be made nothing but a matter of past history. In this context of clashing objectives it is not surprising that the judge's most recent 1968 order should have failed fully to satisfy either side. It is gratifying, however, that the differences are so minor as they appear to us to be.

In his 1968 order Judge Johnson provided for safeguards to assure that construction of new schools or additions to existing schools would not follow a pattern tending to perpetuate segregation. The order also provided for the adoption of nondiscriminatory bus routes and for other safeguards to insure that the board's transportation policy would not tend to perpetuate segregation. The order provided for detailed steps to eliminate the impression existing in the school district that the new Jefferson Davis High School and two new elementary schools were to be used primarily by white students. The order also included a requirement that the board file in the near future further specific reports detailing the steps taken to comply with each point of the order. Nearly all of these aspects of the order were accepted by the school board and not challenged in its appeal to the Court of Appeals. Of the provisions so far mentioned, only one aspect of the provision relating to Jefferson Davis High School was challenged in the Court of Appeals, and after the Court of Appeals upheld Judge Johnson's order on this point, the school board accepted its decision and did not seek review on the question here.

The dispute in this action thus centers only on that part of the 1968 order which deals with faculty and staff

desegregation, a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination. See, *e. g.*, *Bradley* v. *School Board*, 382 U. S. 103 (1965); *Rogers* v. *Paul*, 382 U. S. 198 (1965). Judge Johnson noted that in 1966 he had ordered the board to begin the process of faculty desegregation in the 1966–1967 school year but that the board had not made adequate progress toward this goal. He also found:

> "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year of 1968–69." 289 F. Supp., at 650.

He therefore concluded that a more specific order would be appropriate under all the circumstances to establish the minimum amount of progress that would be required for the future. To this end his order provided that the board must move toward a goal under which "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." *Id.*, at 654. In addition, the order set forth a specific schedule. The ratio of Negro to white teachers in the assignment of substitute, student, and night school teachers in each school was to be almost immediately made substantially the same as the ratio of Negro to white teachers in each of these groups for the system as a whole. With respect to full-time teachers, a more gradual schedule was set forth. At the time the ratio of white to Negro full-time teachers in the system as a whole was three to two. For the 1968–1969 school year, each school with fewer than 12 teachers was required to

have at least two full-time teachers whose race was different from the race of the majority of the faculty at that school, and in schools with 12 or more teachers, the race of at least one out of every six faculty and staff members was required to be different from the race of the majority of the faculty and staff members at that school. The goals to be required for future years were not specified but were reserved for later decision. About a week later Judge Johnson amended part of the original order by providing that in the 1968–1969 term schools with less than 12 teachers would be required to have only one full-time teacher of the minority race rather than two, as he had originally required.

It was the part of the District Court's order containing this ratio pattern that prompted the modification of the order by the Court of Appeals. Agreeing that the District Court had properly found from "extensive hearings . . . that desegregation of faculties in the Montgomery County school system was lagging and that appellants [the school board] had failed to comply with earlier orders of the court requiring full faculty desegregation," and noting that the testimony of school officials themselves indicated the need for more specific guidelines,[5]

[5] The Court of Appeals quoted the following excerpt from the testimony of Associate Superintendent W. S. Garrett:

"Q. Well, under your plan, when do you estimate that faculty desegregation will be finally accomplished in terms of the objective of the court order removing—

"A. Well, now, that is something I don't know, because I don't know what the objectives of the court order are. That has never been laid down in any percentage fashion that I know of. It says that you will have reasonable desegregation of faculty and that you will strive toward having each faculty not recognizable as being staffed for a particular race. That is what I get out of it.

"Q. Well, let—

"A. So I— I can't— this court order is in fairly general terms; I can't answer that question.

"Q. Well, you made the statement about having schools staffed so

the Court of Appeals nevertheless struck down parts of the order which it viewed as requiring "fixed mathematical" ratios. It held that the part of the order setting a specific goal for the 1968–1969 school year should be modified to require only "*substantially* or *approximately*" the 5–1 ratio required by Judge Johnson's order. With respect to the ultimate objective for the future, it held that the numerical ratio should be eliminated and that compliance should not be tested solely by the achievement of specified ratios. In so holding, the Court of Appeals made many arguments against rigid or inflexible orders in this kind of case. These arguments might possibly be more troublesome if we read the District Court's order as being absolutely rigid and inflexible, as did the Court of Appeals. But after a careful consideration of the whole record we cannot believe that Judge Johnson had any such intention. During the four or five years that he held hearings and considered the problem before him, new orders, as previously shown, were issued annually and sometimes more often. On at least one occasion Judge Johnson, on his own motion, amended his outstanding order because a less stringent order for another

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that they will not be recognizable as for a particular race; when do you expect that that will be accomplished?

"A. Well, that would depend on what the Board's definition of that is, the court's definition of that.

"Q. Do you have a definition of that?

"A. Not at this point; we have discussed that many times, and I do not have a definition of— of what that would mean.

"Q. No one has told you, given you a definition in terms of mechanics, in terms of numbers, none of your superiors?

"A. No, as far as I know, no other school personnel man in America has. I have talked to many of them. What we are striving to do is to make progress and keep going and hope that somewhere along the line we will have achieved the— what the court has in mind. But if you will look at that court order, you will see it doesn't lay down the precise terms exactly what that means; it is a broad definition."

district had been approved by the Court of Appeals. This was done in order not to inflict any possible injustice on the Montgomery County school system. Indeed the record is filled with statements by Judge Johnson showing his full understanding of the fact that, as this Court also has recognized, in this field the way must always be left open for experimentation.[6]

Judge Johnson's order now before us was adopted in the spirit of this Court's opinion in *Green* v. *County School Board, supra,* at 439, in that his plan "promises realistically to work, and promises realistically to work *now.*" The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. We believe it best to leave Judge Johnson's order as written rather than as modified by the 2–1 panel, particularly in view of the fact that the Court of Appeals as a whole was evenly divided on this subject. We also believe that under all the circumstances of this case we follow the original plan outlined in *Brown II,* as brought up to date by this Court's opinions in *Green* v. *County School Board, supra,* and *Griffin* v. *School Board,* 377 U. S. 218, 233–234 (1964), by accepting the more specific and

[6] As we stated in *Green* v. *County School Board, supra,* at 439: "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness."

expeditious order of Judge Johnson, whose patience and wisdom are written for all to see and read on the pages of the five-year record before us.

It is good to be able to decide a case with the feelings we have about this one. The differences between the parties are exceedingly narrow. Respondents, members of the Montgomery County school board, state clearly in their brief, "These respondents recognize their affirmative responsibility to provide a desegregated, unitary and nonracial school system. These respondents recognize their responsibility to assign teachers without regard to race so that schools throughout the system are not racially identifiable by their faculties . . . ." Brief for Respondents 11–12. Petitioners, on the other hand, do not argue for precisely equal ratios in every single school under all circumstances. As the United States, petitioner in No. 798, recognizes in its brief, the District Court's order "is designed as a *remedy for* past racial assignment . . . . We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required." Brief for the United States 13. In short, the Montgomery County school board, and its counsel, assert their purpose to bring about a racially integrated school system as early as practicable in good-faith obedience to this Court's decisions. Both the District Judge and the Court of Appeals have accorded to the parties and their counsel courteous and patient consideration; there is no sign of lack of interest in the cause of either justice or education in the views maintained by any of the parties or in the orders entered by either of the courts below. Despite the fact that the individual petitioners in this litigation have with some reason argued that Judge Johnson should have gone farther to protect their rights than he did, we approve his order as he wrote it. This, we believe, is the best course we can take in the interest of the petitioners and the public school system of Alabama.

We hope and believe that this order and the approval that we now give it will carry Alabama a long distance on its way toward obedience to the law of the land as we have declared it in the two *Brown* cases and those that have followed them.

The judgment of the Court of Appeals is reversed, and the cases are remanded with directions to affirm the judgment of the District Court.

It is so ordered.

BOYKIN *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 642. Argued March 4, 1969.—Decided June 2, 1969.

Petitioner, a 27-year-old Negro, who was represented by appointed counsel, pleaded guilty to five indictments for common-law robbery. The judge asked no questions of petitioner concerning his plea, and petitioner did not address the court. Under Alabama law providing for a jury trial to fix punishment on a guilty plea, the prosecution presented eyewitness testimony and petitioner's counsel cursorily cross-examined. Petitioner did not testify; no character or background testimony was presented for him; and there was nothing to indicate that he had a prior criminal record. The jury found petitioner guilty and sentenced him to death on each indictment. The Alabama Supreme Court reviewed the sentences under the State's automatic appeal statute for capital cases, which requires the reviewing court to comb the record for prejudicial error even though not raised by counsel. Petitioner did not raise the question of the voluntariness of his guilty plea and the State Supreme Court did not pass on that question, though a majority of the court explicitly considered it in affirming his sentences of death. *Held:*

1. This Court has jurisdiction to review the question of the voluntary character of the plea since the plain error of the trial judge's acceptance of petitioner's guilty plea absent an affirmative showing that the plea was intelligent and voluntary was before the state court under the Alabama automatic appeal statute. Pp. 241–242.

2. A waiver of the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by the Fourteenth; of the right to trial by jury; and the right to confront one's accusers—all of which are involved when a guilty plea is entered in a state criminal trial—cannot be presumed from a silent record. Pp. 242–243.

3. Acceptance of the petitioner's guilty plea under the circumstances of this case constituted reversible error because the record does not disclose that the petitioner voluntarily and understandingly entered his plea of guilty. Pp. 243–244.

281 Ala. 659, 207 So. 2d 412, reversed.

E. Graham Gibbons, by appointment of the Court, 393 U. S. 931, argued the cause for petitioner. With him on the brief was *Stephen A. Hopkins*.

David W. Clark, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *MacDonald Gallion*, Attorney General.

Jack Greenberg, *James M. Nabrit III*, *Michael Meltsner*, *Melvyn Zarr*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In the spring of 1966, within the period of a fortnight, a series of armed robberies occurred in Mobile, Alabama. The victims, in each case, were local shopkeepers open at night who were forced by a gunman to hand over money. While robbing one grocery store, the assailant fired his gun once, sending a bullet through a door into the ceiling. A few days earlier in a drugstore, the robber had allowed his gun to discharge in such a way that the bullet, on ricochet from the floor, struck a customer in the leg. Shortly thereafter, a local grand jury returned five indictments against petitioner, a 27-year-old Negro, for common-law robbery—an offense punishable in Alabama by death.

Before the matter came to trial, the court determined that petitioner was indigent and appointed counsel [1] to represent him. Three days later, at his arraignment, petitioner pleaded guilty to all five indictments. So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court.

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[1] *Hamilton* v. *Alabama*, 368 U. S. 52; Ala. Code, Tit. 15, §§ 318 (1)–(12) (Supp. 1967).

Trial strategy may of course make a plea of guilty seem the desirable course. But the record is wholly silent on that point and throws no light on it.

Alabama provides that when a defendant pleads guilty, "the court must cause the punishment to be determined by a jury" (except where it is required to be fixed by the court) and may "cause witnesses to be examined, to ascertain the character of the offense." Ala. Code, Tit. 15, § 277 (1958). In the present case a trial of that dimension was held, the prosecution presenting its case largely through eyewitness testimony. Although counsel for petitioner engaged in cursory cross-examination, petitioner neither testified himself nor presented testimony concerning his character and background. There was nothing to indicate that he had a prior criminal record.

In instructing the jury, the judge stressed that petitioner had pleaded guilty in five cases of robbery,[2] defined as "the felonious taking of money . . . from another against his will . . . by violence or by putting him in fear . . . [carrying] from ten years minimum in the penitentiary to the supreme penalty of death by electrocution." The jury, upon deliberation, found petitioner guilty and sentenced him severally to die on each of the five indictments.

Taking an automatic appeal to the Alabama Supreme Court, petitioner argued that a sentence of death for common-law robbery was cruel and unusual punishment within the meaning of the Federal Constitution, a suggestion which that court unanimously rejected. 281 Ala. 659, 207 So. 2d 412. On their own motion, however, four of the seven justices discussed the constitutionality of the process by which the trial judge had accepted petitioner's guilty plea. From the order affirming the

[2] The elements of robbery in Alabama are derived from the common law, but the possible penalties are fixed by statute. Ala. Code, Tit. 14, § 415 (1958).

trial court, three justices dissented on the ground that the record was inadequate to show that petitioner had intelligently and knowingly pleaded guilty. The fourth member concurred separately, conceding that "a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant," but refusing "[f]or aught appearing" "to presume that the trial judge failed to do his duty." 281 Ala., at 662, 663, 207 So. 2d, at 414, 415. We granted certiorari. 393 U. S. 820.

Respondent does not suggest that we lack jurisdiction to review the voluntary character of petitioner's guilty plea because he failed to raise that federal question below and the state court failed to pass upon it.[3] But the question was raised on oral argument and we conclude that it is properly presented. The very Alabama statute (Ala. Code, Tit. 15, § 382 (10) (1958)) that provides automatic appeal in capital cases also requires the reviewing court to comb the record for "any error prejudicial to the appellant, even though not called to our attention in brief of counsel." *Lee* v. *State,* 265 Ala. 623, 630, 93 So. 2d 757, 763. The automatic appeal statute "is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review." *Douglas* v. *State,* 42 Ala. App. 314, 331, n. 6, 163 So. 2d 477, 494, n. 6. In the words of the Alabama Supreme Court:

> "Perhaps it is well to note that in reviewing a death case under the automatic appeal statute, . . . we may consider any testimony that was seriously prejudicial to the rights of the appellant and may

[3] This is unlike *Cardinale* v. *Louisiana,* 394 U. S. 437, in which the state court was perhaps unacquainted with the federal question at issue. For, as already stated, four of the seven justices on the court below (a majority) discussed the matter and its implications for Alabama law.

> reverse thereon, even though no lawful objection or exception was made thereto. [Citations omitted.] Our review is not limited to the matters brought to our attention in brief of counsel." *Duncan* v. *State*, 278 Ala. 145, 157, 176 So. 2d 840, 851.

It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review.

A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See *Kercheval* v. *United States*, 274 U. S. 220, 223. Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." *Jackson* v. *Denno*, 378 U. S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley* v. *Cochran*, 369 U. S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction.[4] Ignorance,

[4] "A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the

incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. *Douglas* v. *Alabama,* 380 U. S. 415, 422.

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan,* 378 U. S. 1. Second, is the right to trial by jury. *Duncan* v. *Louisiana,* 391 U. S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas,* 380 U. S. 400. We cannot presume a waiver of these three important federal rights from a silent record.[5]

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts

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prosecution need be advanced . . . . It supplies both evidence and verdict, ending controversy." *Woodard* v. *State,* 42 Ala. App. 552, 558, 171 So. 2d 462, 469.

[5] In the federal regime we have Rule 11 of the Federal Rules of Criminal Procedure which governs the duty of the trial judge before accepting a guilty plea. See *McCarthy* v. *United States,* 394 U. S. 459. We said in that case:

"A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.,* at 466.

are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought [6] (*Garner* v. *Louisiana*, 368 U. S. 157, 173; *Specht* v. *Patterson*, 386 U. S. 605, 610), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.[7]

The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error "because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." 281 Ala., at 663, 207 So. 2d, at 415.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

The Court today holds that petitioner Boykin was denied due process of law, and that his robbery convictions must be reversed outright, solely because "the record

[6] Among the States requiring that an effective waiver of the right to plead not guilty appear affirmatively in the record are Colorado, Colo. Rev. Stat. Ann. § 39–7–8; Illinois, Ill. Rev. Stat., c. 38, §§ 113–1 to 114–14; Missouri, *State* v. *Blaylock*, 394 S. W. 2d 364 (1965); New York, *People* v. *Seaton*, 19 N. Y. 2d 404, 407, 227 N. E. 2d 294, 295 (1967); Wisconsin, *State* v. *Burke*, 22 Wis. 2d 486, 494, 126 N. W. 2d 91, 96 (1964); and Washington, *Woods* v. *Rhay*, 68 Wash. 2d 601, 605, 414 P. 2d 601, 604 (1966).

[7] "A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences." *Commonwealth ex rel. West* v. *Rundle*, 428 Pa. 102, 105–106, 237 A. 2d 196, 197–198 (1968).

[is] inadequate to show that petitioner . . . intelligently and knowingly pleaded guilty." *Ante,* at 241. The Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure. It does so in circumstances where the Court itself has only very recently held application of Rule 11 to be unnecessary in the federal courts. See *Halliday* v. *United States,* 394 U. S. 831 (1969). Moreover, the Court does all this at the behest of a petitioner who has never at any time alleged that his guilty plea was involuntary or made without knowledge of the consequences. I cannot possibly subscribe to so bizarre a result.

I.

In June 1966, an Alabama grand jury returned five indictments against petitioner Boykin, on five separate charges of common-law robbery. He was determined to be indigent, and on July 11 an attorney was appointed to represent him. Petitioner was arraigned three days later. At that time, in open court and in the presence of his attorney, petitioner pleaded guilty to all five indictments. The record does not show what inquiries were made by the arraigning judge to confirm that the plea was made voluntarily and knowingly.[1]

Petitioner was not sentenced immediately after the acceptance of his plea. Instead, pursuant to an Alabama statute, the court ordered that "witnesses . . . be examined, to ascertain the character of the offense," in the presence of a jury which would then fix petitioner's sen-

[1] The record states only that:

"This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment in these cases charging him with the offense of Robbery and plead guilty." Appendix 4.

tence. See Ala. Code, Tit. 14, § 415 (1958); Tit. 15, § 277. That proceeding occurred some two months after petitioner pleaded guilty. During that period, petitioner made no attempt to withdraw his plea. Petitioner was present in court with his attorney when the witnesses were examined. Petitioner heard the judge state the elements of common-law robbery and heard him announce that petitioner had pleaded guilty to that offense and might be sentenced to death. Again, petitioner made no effort to withdraw his plea.

On his appeal to the Alabama Supreme Court, petitioner did not claim that his guilty plea was made involuntarily or without full knowledge of the consequences. In fact, petitioner raised no questions at all concerning the plea.[2] In his petition and brief in this Court, and in oral argument by counsel, petitioner has never asserted that the plea was coerced or made in ignorance of the consequences.

II.

Against this background, the Court holds that the Due Process Clause of the Fourteenth Amendment requires the outright reversal of petitioner's conviction. This result is wholly unprecedented. There are past holdings of this Court to the effect that a federal habeas corpus petitioner who makes sufficiently credible allegations that his state guilty plea was involuntary is entitled to a hearing as to the truth of those allegations. See, *e. g.*, *Waley* v. *Johnston*, 316 U. S. 101 (1942); cf. *Machibroda* v. *United States*, 368 U. S. 487 (1962). These holdings suggest that if equally convincing allegations were made in a petition for certiorari on direct review, the petitioner might in some circumstances be

[2] However, I am willing to accept the majority's view that we do have jurisdiction to consider the question.

entitled to have a judgment of affirmance vacated and the case remanded for a state hearing on voluntariness. Cf. *Jackson* v. *Denno*, 378 U. S. 368, 393–394 (1964). However, as has been noted, this petitioner makes no allegations of actual involuntariness.

The Court's reversal is therefore predicated entirely upon the failure of the arraigning state judge to make an "adequate" record. In holding that this is a ground for reversal, the Court quotes copiously from *McCarthy* v. *United States*, 394 U. S. 459 (1969), in which we held earlier this Term that when a *federal* district judge fails to comply in every respect with the procedure for accepting a guilty plea which is prescribed in Rule 11 of the Federal Rules of Criminal Procedure, the plea must be set aside and the defendant permitted to replead, regardless of lower-court findings that the plea was in fact voluntary. What the Court omits to mention is that in *McCarthy* we stated that our decision was based "solely upon our construction of Rule 11," and explicitly disavowed any reliance upon the Constitution. *Id.*, at 464. Thus *McCarthy* can provide no support whatever for today's constitutional edict.

III.

So far as one can make out from the Court's opinion, what is now in effect being held is that the prophylactic procedures of Criminal Rule 11 are substantially applicable to the States as a matter of federal constitutional due process. If this is the basis upon which Boykin's conviction is being reversed, then the Court's disposition is plainly out of keeping with a sequel case to *McCarthy*, decided only last month. For the Court held in *Halliday* v. *United States*, 394 U. S. 831 (1969), that "in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroac-

tively." *Id.*, at 833. The Court quite evidently found Halliday's conviction to be "constitutionally valid," for it affirmed the conviction even though Halliday's guilty plea was accepted in 1954 without any explicit inquiry into whether it was knowingly and understandingly made, as now required by present Rule 11. In justification, the Court noted that two lower courts had found in collateral proceedings that the plea was voluntary. The Court declared that:

> "[A] defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy*, he is not without a remedy to correct constitutional defects in his conviction." *Id.*, at 833.

It seems elementary that the Fifth Amendment due process to which petitioner Halliday was entitled must be at least as demanding as the Fourteenth Amendment process due petitioner Boykin. Yet petitioner Halliday's federal conviction has been affirmed as "constitutionally valid," despite the omission of any judicial inquiry of record at the time of his plea, because he initiated collateral proceedings which revealed that the plea was actually voluntary. Petitioner Boykin, on the other hand, today has his Alabama conviction reversed because of exactly the same omission, even though he too "may . . . resort to appropriate post-conviction remedies to attack his plea's voluntariness" and thus "is not without a remedy to correct constitutional defects in his conviction." In short, I find it utterly impossible to square today's holding with what the Court has so recently done.

I would hold that petitioner Boykin is not entitled to outright reversal of his conviction simply because of

the "inadequacy" of the record pertaining to his guilty plea. Further, I would not vacate the judgment below and remand for a state-court hearing on voluntariness. For even if it is assumed for the sake of argument that petitioner would be entitled to such a hearing if he had alleged that the plea was involuntary, a matter which I find it unnecessary to decide, the fact is that he has never made any such claim. Hence, I consider that petitioner's present arguments relating to his guilty plea entitle him to no federal relief.[3]

[3] Petitioner advances two additional constitutional arguments: that imposition of the death penalty for common-law robbery is "cruel and unusual punishment" in violation of the Fourteenth Amendment; and that to permit a jury to inflict the death penalty without any "standards" to guide its discretion amounts to a denial of due process. I do not reach these issues because the Court has not done so.

HARRINGTON *v.* CALIFORNIA.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 750. Argued April 23, 1969.—Decided June 2, 1969.

Petitioner, who is white, and three Negro codefendants (Bosby, Rhone, and Cooper) were tried for first-degree murder. Petitioner's statements placed him at the scene of the crime. He admitted that Bosby was the trigger man; that he fled with the other three; and that after the murder he dyed his hair and shaved off his moustache. Eyewitnesses placed petitioner at the scene of the crime, but some had previously said that four Negroes committed the crime. The three codefendants confessed, and their confessions were introduced at trial. Rhone's confession placed petitioner inside the store with a gun at the time of the crime. Rhone took the stand and petitioner's counsel cross-examined him. Bosby and Cooper did not take the stand, and in their confessions, which mentioned petitioner (not by name, but as "the white guy" or by similar terms), said that they did not see "the white guy" with a gun. All four codefendants were found guilty of first-degree murder, the California Court of Appeal affirmed, and the State Supreme Court denied a petition for a hearing. *Held:* Apart from the cumulative nature of the confessions of the two codefendants who did not take the stand, the evidence against petitioner consisting of direct testimony as opposed to circumstantial evidence was so overwhelming that the violation of *Bruton* v. *United States,* 391 U. S. 123 (which held that the admission of a confession of a codefendant who did not take the stand deprived the defendant of his rights under the Sixth Amendment's Confrontation Clause), was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18. Pp. 251–254.

256 Cal. App. 2d 209, 64 Cal. Rptr. 159, affirmed.

Roger S. Hanson, by appointment of the Court, 393 U. S. 1075, argued the cause and filed briefs for petitioner.

James H. Kline, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, and *William E. James,* Assistant Attorney General.

Briefs of *amici curiae* urging affirmance were filed by *William J. Scott*, Attorney General, and *James R. Thompson*, *James B. Haddad* and *James B. Zagel*, Assistant Attorneys General, for the State of Illinois, and by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Amy Juviler* and *Brenda Soloff*, Assistant Attorneys General, for the State of New York, joined and supported by *John D. LaDelle* for the State of Connecticut, *Paul J. Abbate*, Attorney General, for the Territory of Guam, and by the Attorneys General for their respective States as follows: *Gary K. Nelson* of Arizona, *Joe Purcell* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Bert T. Kobayashi* of Hawaii, *Theodore L. Sendak* of Indiana, *Richard C. Turner* of Iowa, *Kent Frizzell* of Kansas, *John B. Breckinridge* of Kentucky, *Robert H. Quinn* of Massachusetts, *Douglas M. Head* of Minnesota, *Joe T. Patterson* of Mississippi, *Robert L. Woodahl* of Montana, *Clarence A. H. Meyer* of Nebraska, *James A. Maloney* of New Mexico, *Robert B. Morgan* of North Carolina, *Helgi Johanneson* of North Dakota, *Paul W. Brown* of Ohio, *Daniel R. McLeod* of South Carolina, *Gordon Mydland* of South Dakota, *George F. McCanless* of Tennessee, *Vernon B. Romney* of Utah, *Robert Y. Button* of Virginia, and *Slade Gorton* of Washington.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

We held in *Chapman* v. *California*, 386 U. S. 18, that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24. We said that, although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (*id.*, at 23), not all

"trial errors which violate the Constitution automatically call for reversal." *Ibid.*

The question whether the alleged error in the present case was "harmless" under the rule of *Chapman* arose in a state trial for attempted robbery and first-degree murder. Four men were tried together—Harrington, a Caucasian, and Bosby, Rhone, and Cooper, Negroes—over an objection by Harrington that his trial should be severed. Each of his three codefendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone took the stand and Harrington's counsel cross-examined him. The other two did not take the stand.[1]

In *Bruton* v. *United States*, 391 U. S. 123, a confession of a codefendant who did not take the stand was used against Bruton in a federal prosecution. We held that Bruton had been denied his rights under the Confrontation Clause of the Sixth Amendment. Since the Confrontation Clause is applicable as well in state trials by reason of the Due Process Clause of the Fourteenth Amendment (*Pointer* v. *Texas*, 380 U. S. 400), the rule of *Bruton* applies here.

The California Court of Appeal affirmed the convictions, 256 Cal. App. 2d 209, 64 Cal. Rptr. 159, and the Supreme Court denied a petition for a hearing. We granted the petition for certiorari to consider whether the violation of *Bruton* was on these special facts harmless error under *Chapman*.

Petitioner made statements which fell short of a confession but which placed him at the scene of the crime. He admitted that Bosby was the trigger man;

[1] All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each was found guilty of felony murder and sentenced to life imprisonment.

that he fled with the other three; and that after the murder he dyed his hair black and shaved off his moustache. Several eyewitnesses placed petitioner at the scene of the crime. But two of them had previously told the police that four Negroes committed the crime. Rhone's confession, however, placed Harrington inside the store with a gun at the time of the attempted robbery and murder.

Cooper's confession did not refer to Harrington by name. He referred to the fourth man as "the white boy" or "this white guy." And he described him by age, height, and weight.

Bosby's confession likewise did not mention Harrington by name but referred to him as a blond-headed fellow or "the white guy" or "the Patty."

Both Cooper and Bosby said in their confessions that they did not see "the white guy" with a gun, which is at variance with the testimony of the prosecution witnesses.

Petitioner argues that it is irrelevant that he was not named in Cooper's and Bosby's confessions, that reference to "the white guy" made it as clear as pointing and shouting that the person referred to was the white man in the dock with the three Negroes. We make the same assumption. But we conclude that on these special facts the lack of opportunity to cross-examine Cooper and Bosby constituted harmless error under the rule of *Chapman.*

Rhone, whom Harrington's counsel cross-examined, placed him in the store with a gun at the time of the murder. Harrington himself agreed he was there. Others testified he had a gun and was an active participant. Cooper and Bosby did not put a gun in his hands when he denied it.[2] They did place him at the scene of

[2] "All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." *People* v. *Washington,* 62 Cal. 2d 777, 782, 402 P. 2d 130, 133.

the crime. But others, including Harrington himself, did the same. Their evidence, supplied through their confessions, was of course cumulative. But apart from them the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* (386 U. S., at 42–45) that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence.

It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury. We admonished in *Chapman,* 386 U. S., at 23, against giving too much emphasis to "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless. By that test we cannot impute reversible weight to the two confessions.

We do not depart from *Chapman;* nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed.

Affirmed.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE MARSHALL join, dissenting.

The Court today overrules *Chapman* v. *California*, 386 U. S. 18 (1967), the very case it purports to apply. Far more fundamentally, it severely undermines many of the Court's most significant decisions in the area of criminal procedure.

In *Chapman*, we recognized that "harmless-error rules can work very unfair and mischievous results" unless they are narrowly circumscribed. *Id.*, at 22. We emphasized that "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Id.*, at 23–24. Thus, placing the burden of proof on the beneficiary of the error, we held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24. And, we left no doubt that for an error to be "harmless" it must have made *no* contribution to a criminal conviction. *Id.*, at 26.

Chapman, then, meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of *Chapman* and makes that compromise. As a result, the deterrent effect of such cases as *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Griffin* v. *California*, 380 U. S. 609 (1965); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *United States* v. *Wade*, 388 U. S. 218 (1967); and *Bruton* v. *United States*, 391 U. S. 123 (1968), on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.

The Court holds that constitutional error in the trial of a criminal offense may be held harmless if there is "overwhelming" untainted evidence to support the conviction. This approach, however, was expressly rejected in *Chapman, supra,* at 23, and with good reason. For, where the inquiry concerns the extent of accumulation of untainted evidence rather than the impact of tainted evidence on the jury's decision, convictions resulting from constitutional error may be insulated from attack. By its nature, the issue of substantiality of evidence admits of only the most limited kind of appellate review. Thus, the Court's rule will often effectively leave the vindication of constitutional rights solely in the hands of trial judges. If, instead, the task of appellate courts is to appraise the impact of tainted evidence on a jury's decision, as *Chapman* required, these courts will be better able to protect against deprivations of constitutional rights of criminal defendants. The focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence.

The instant case illustrates well the difference in application between the approach adopted by the Court today and the approach set down in *Chapman.* At issue is the evidence going to Harrington's participation in the crime of attempted robbery, not the evidence going to his presence at the scene of the crime. Without the admittedly unconstitutional evidence against Harrington provided by the confessions of codefendants Bosby and Cooper, the prosecutor's proof of Harrington's participation in the crime consisted of the testimony of two victims of the attempted robbery and of codefendant Rhone. The testimony of the victims was weakened by the fact that they had earlier told the police that all the participants in the attempted robbery were Negroes. Rhone's testimony against Harrington was

self-serving in certain aspects. At the time of his arrest, Rhone was found in possession of a gun. On the stand, he explained that he was given the gun by Harrington after the attempted robbery, and that Harrington had carried the gun during the commission of the robbery. Thus, although there was more than ample evidence to establish Harrington's participation in the attempted robbery, a jury might still have concluded that the case was not proved beyond a reasonable doubt. The confessions of the other two codefendants implicating Harrington in the crime were less self-serving and might well have tipped the balance in the jurors' minds in favor of conviction. Certainly, the State has not carried its burden of demonstrating beyond a reasonable doubt that these two confessions did not contribute to Harrington's conviction.

There should be no need to remind this Court that the appellate role in applying standards of sufficiency or substantiality of evidence is extremely limited. To apply such standards as threshold requirements to the raising of constitutional challenges to criminal convictions is to shield from attack errors of a most fundamental nature and thus to deprive many defendants of basic constitutional rights. I respectfully dissent.

O'CALLAHAN *v.* PARKER, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 646. Argued January 23, 1969.—Decided June 2, 1969.

Petitioner, a United States Army sergeant, while on an evening pass from his army post in Hawaii and in civilian attire, broke into a hotel room, assaulted a girl, and attempted rape. Following his apprehension, city police, on learning that petitioner was in the Armed Forces, delivered him to the military police. After interrogation, petitioner confessed. He was charged with attempted rape, housebreaking, and assault with attempt to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice, tried by a court-martial, convicted on all counts, and sentenced. His conviction was affirmed by the Army Board of Review and thereafter by the United States Court of Military Appeals. Petitioner later filed a petition for a writ of habeas corpus in the District Court claiming that the court-martial was without jurisdiction to try him for nonmilitary offenses committed off-post while on an evening pass. The District Court denied relief and the Court of Appeals affirmed. *Held:* A crime, to be under military jurisdiction, must be service connected, and since petitioner's crimes were not, he could not be tried by court-martial but was entitled to a civilian trial with the benefits of an indictment by a grand jury and trial by jury. Pp. 261–274.

(a) Art. I, § 8, cl. 14, of the Constitution recognizes that military discipline requires military courts in which not all the procedural safeguards of Art. III trials need apply, and the Fifth Amendment exempts "cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment and the right to trial by jury. See *Ex parte Quirin*, 317 U. S. 1, 40. Pp. 261–262.

(b) If the case does not arise "in the land or naval forces," the accused gets (1) the benefit of an indictment by a grand jury and (2) a trial by jury before a civilian court as guaranteed by the Sixth Amendment and Art. III, § 2. P. 262.

(c) A court-martial (which is tried in accordance with military traditions and procedures by a panel of officers empowered to act by two-thirds vote presided over by a military law officer) is not

an independent instrument of justice but a specialized part of an overall system by which military discipline is preserved. Pp. 263–265.

(d) A civilian trial is conducive to the protection of individual rights, while a military trial is marked by retributive justice. P. 266.

(e) The fact that petitioner at the time of his offense and of his court-martial was a member of the Armed Forces does not necessarily mean that he was triable by court-martial. Pp. 266–267.

(f) In England before the American Revolution and in this country military trials of soldiers for civilian offenses have been viewed with suspicion. Pp. 268–271.

(g) To be under military jurisdiction a crime must be service connected lest all members of the armed services be deprived of the benefits of grand jury indictment and jury trial. Pp. 272–273.

(h) There was not even a remote connection between petitioner's crimes and his military duties, and the offenses were peacetime offenses, committed in American territory which did not involve military authority, security, or property. Pp. 273–274.

390 F. 2d 360, reversed.

Victor Rabinowitz argued the cause and filed briefs for petitioner.

James vanR. Springer argued the cause for respondent. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, then a sergeant in the United States Army, was stationed in July 1956, at Fort Shafter, Oahu, in the Territory of Hawaii. On the night of July 20, while on an evening pass, petitioner and a friend left the post dressed in civilian clothes and went into Honolulu. After a few beers in the bar of a hotel, petitioner entered the residential part of the hotel where

he broke into the room of a young girl and assaulted and attempted to rape her. While fleeing from her room onto Waikiki Beach, he was apprehended by a hotel security officer who delivered him to the Honolulu city police for questioning. After determining that he was a member of the Armed Forces, the city police delivered petitioner to the military police. After extensive interrogation, petitioner confessed and was placed in military confinement.

Petitioner was charged with attempted rape, housebreaking, and assault with intent to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice.[1] He was tried by court-martial, convicted on all counts, and given a sentence of 10 years' imprisonment at hard labor, forfeiture of all pay and

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[1] Article 80 of the Uniform Code of Military Justice (10 U. S. C. § 880) provides in part:

"(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

"(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed."

Article 130 (10 U. S. C. § 930) provides:

"Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct."

Article 134 (10 U. S. C. § 934) provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

allowances, and dishonorable discharge. His conviction was affirmed by the Army Board of Review and, subsequently, by the United States Court of Military Appeals.

Under confinement at the United States Penitentiary at Lewisburg, Pennsylvania, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, alleging, *inter alia*, that the court-martial was without jurisdiction to try him for nonmilitary offenses committed off-post while on an evening pass. The District Court denied relief without considering the issue on the merits, and the Court of Appeals for the Third Circuit affirmed. This Court granted certiorari limited to the question:

> "Does a court-martial, held under the Articles of War, Tit. 10, U. S. C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" 393 U. S. 822.

The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. The Fifth Amendment specifically exempts "cases arising *in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury. (Emphasis supplied.) See *Ex parte Quirin*, 317 U. S. 1, 40. The result has been the estab-

lishment and development of a system of military justice with fundamental differences from the practices in the civilian courts.

If the case does not arise *"in the land or naval forces,"* then the accused gets *first,* the benefit of an indictment by a grand jury and *second,* a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution which provides in part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Those civil rights are the constitutional stakes in the present litigation. What we wrote in *Toth* v. *Quarles,* 350 U. S. 11, 17–18, is worth emphasis:

> "We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of

qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

"Moreover, there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury."

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers [2] empowered to act by a two-thirds vote.

[2] Under Art. 25 (c) of the Uniform Code of Military Justice, 10 U. S. C. § 825 (c), at least one-third of the members of the court-martial trying an enlisted man are required to be enlisted men if the accused requests that enlisted personnel be included in the court-martial. In practice usually only senior enlisted personnel, *i. e.*,

The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer.[3] Substantially different rules of evidence and procedure apply in military trials.[4] Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.[5]

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noncommissioned officers, are selected. See *United States* v. *Crawford*, 15 U. S. C. M. A. 31, 35 C. M. R. 3, motion for leave to file petition for certiorari denied, 380 U. S. 970. See generally Schiesser, Trial by Peers: Enlisted Members on Courts-Martial, 15 Catholic U. L. Rev. 171 (1966).

[3] At the time petitioner was tried, a general court-martial was presided over by a "law officer," who was required to be a member of the bar and certified by the Judge Advocate General for duty as a law officer. U. C. M. J. Art. 26 (a). The "law officer" could be a direct subordinate of the convening authority. Manual for Courts-Martial, United States, 1951, ¶4*g* (1). The Military Justice Act of 1968, 82 Stat. 1335, establishes a system of "military judges" intended to insure that where possible the presiding officer of a court-martial will be a professional military judge, not directly subordinate to the convening authority.

[4] For example, in a court-martial, the access of the defense to compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent on the approval of the prosecution. *United States* v. *Harvey*, 8 U. S. C. M. A. 538, 25 C. M. R. 42, approving Manual for Courts-Martial, United States, 1951, ¶115*a*. See Melnick, The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint, 29 Mil. L. Rev. 1 (1965).

[5] See, *e. g.*, the cases listed in Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S. Res. No. 260, 87th Cong., 2d Sess., 780–781 (1962), in each of which the Court of Military Appeals reversed court-martial convictions on the ground of excessive command influence.

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.[6]

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, *e. g.*, *Burns* v. *Wilson*, 346 U. S. 137, but in examining the reach of their jurisdiction, it has recognized that

> "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . .
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> "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to *'the least possible power adequate to the end proposed.'*" *Toth* v. *Quarles*, 350 U. S. 11, 22–23.

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. Article 134, already quoted, punishes

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[6] See *Reid* v. *Covert*, 354 U. S. 1, 36.

as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Does this satisfy the standards of vagueness as developed by the civil courts? It is not enough to say that a court-martial may be reversed on appeal. One of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise. See *Dombrowski* v. *Pfister,* 380 U. S. 479. A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.[7]

As recently stated: "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969).

The mere fact that petitioner was at the time of his offense and of his court-martial on active duty in the Armed Forces does not automatically dispose of this case under our prior decisions.

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[7] For sobering accounts of the impact of so-called military justice on civil rights of members of the Armed Services see Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S. Res. No. 260, 87th Cong., 2d Sess., Feb. 20 and 21, March 1, 2, 6, 9, and 12, 1962; Joint Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a Special Subcommittee of the Senate Armed Services Committee, 89th Cong., 2d Sess., on S. 745 et al., Pt. 1, Jan. 18, 19, 25, and 26, March 1, 2, and 3, 1966, and Pt. 2. For a newly enacted Military Justice Act see 82 Stat. 1335. And see Summary-Report of Hearings on Constitutional Rights of Military Personnel, by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S. Res. No. 58, 88th Cong., 1st Sess. (1963) (Comm. Print).

We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial. Thus, discharged soldiers cannot be court-martialed for offenses committed while in service. *Toth* v. *Quarles,* 350 U. S. 11. Similarly, neither civilian employees of the Armed Forces overseas, *McElroy* v. *Guagliardo,* 361 U. S. 281; *Grisham* v. *Hagan,* 361 U. S. 278; nor civilian dependents of military personnel accompanying them overseas, *Kinsella* v. *Singleton,* 361 U. S. 234; *Reid* v. *Covert,* 354 U. S. 1, may be tried by court-martial.

These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline. From these cases, the Government invites us to draw the conclusion that once it is established that the accused is a member of the Armed Forces, lack of relationship between the offense and identifiable military interests is irrelevant to the jurisdiction of a court-martial.

The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged. Nor do the cases of this Court suggest any such interpretation. The Government emphasizes that these decisions—especially *Kinsella* v. *Singleton*—establish that liability to trial by court-martial is a question of "status"—"whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" 361 U. S., at 241. But that is merely the beginning of the inquiry, not its end. "Status" is necessary for jurisdiction; but it does not follow that ascertainment of "status" completes the inquiry, regardless of the nature, time, and place of the offense.

Both in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion.[8] Abuses of the court-martial power were an important grievance of the parliamentary forces in the English constitutional crises of the 17th century. The resolution of that conflict came with the acceptance by William and Mary of the Bill of Rights in 1689 which established that in the future, Parliament, not the Crown, would have the power to define the jurisdiction of courts-martial. 1 W. & M., Sess. 2, c. 2. The 17th century conflict over the proper role of courts-martial in the enforcement of the domestic criminal law was not, however, merely a dispute over what organ of government had jurisdiction. It also involved substantive disapproval of the general use of military courts for trial of ordinary crimes.[9]

Parliament, possessed at last of final power in the matter, was quick to authorize, subject to annual renewal, maintenance of a standing army and to give authority for trial by court-martial of certain crimes closely related to military discipline. But Parliament's new power over courts-martial was exercised only very sparingly to ordain military jurisdiction over acts which were also offenses at common law. The first of the annual mutiny acts, 1 W. & M., c. 5, set the tone. It established the general rule that

> "noe Man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall

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[8] The record of historical concern over the scope of court-martial jurisdiction is extensively reviewed in MR. JUSTICE BLACK'S opinion for a plurality of the Court in *Reid* v. *Covert*, 354 U. S. 1, 23–30. See also, Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 441–449 (1960); F. Wiener, Civilians Under Military Justice (1967) (hereinafter cited as Wiener).

[9] See *Reid* v. *Covert*, 354 U. S. 1, 23–26.

> Law or in any other manner than by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme."

And it proceeded to grant courts-martial jurisdiction only over mutiny, sedition, and desertion. In all other respects, military personnel were to be subject to the "Ordinary Processe of Law."

The jurisdiction of British courts-martial over military offenses which were also common-law felonies was from time to time extended,[10] but, with the exception of one year,[11] there was never any general military jurisdiction to try soldiers for ordinary crimes committed in the British Isles. It was, therefore, the rule in Britain at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court.[12] Evasion

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[10] See Wiener c. 1.

[11] The Mutiny Act of 1720, 7 Geo. 1, c. 6, provided that a soldier could be court-martialed for "any Capital Crime, or . . . any Violence or Offence against the Person, Estate, or Property of any of the Subjects of this Kingdom, which is punishable by the known Laws of the Land" unless the civil authorities within eight days of the offense demanded that the accused soldier be turned over to them for trial. In November 1720, the law officers of the Army relied on this new provision of the Mutiny Act to give an opinion that it was proper to try a soldier in Scotland—where ordinary civil courts were functioning—by court-martial for an offense which would have been murder if prosecuted in the civil courts. See Wiener 245–246. The very next year—perhaps in response to that ruling, Wiener 14—the provision was eliminated and did not reappear. The 1721 Act and its successors provided for military trial of common-law crimes only where ordinary civil courts were unavailable. See Prichard, The Army Act and Murder Abroad, 1954 Camb. L. J. 232; Wiener 14, 24–28.

[12] Failure to produce a soldier for civil trial was a military offense by the officer concerned. *E. g.*, British Articles of War of 1765, § 11,

and erosion of the principle that crimes committed by soldiers should be tried according to regular judicial procedure in civil, not military, courts, if any were available, were among the grievances protested by the American Colonists.[13]

Early American practice followed the British model.[14] The Continental Congress, in enacting articles of war in 1776, emphasized the importance of military authority cooperating to insure that soldiers who committed crimes were brought to justice. But it is clear from the context

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Art. 1, reprinted in W. Winthrop, Military Law and Precedents *1448, *1456 (2d ed. 1896, 1920 reprint) (hereinafter cited as Winthrop).

[13] See *Reid* v. *Covert*, 354 U. S. 1, 27–28 and n. 49.

[14] In its brief the Government lists a large number of courts-martial in the very early days of the Nation which it claims indicate that military trial for civil offenses was common in that period. The facts of the cases, as reflected in the brief summaries which are available to us, suggest no such conclusion. In almost every case summarized, it appears that some special military interest existed. Many are peculiarly military crimes—desertions, assaults on and thefts from other soldiers, and stealing government property. While those acts might also be felonies, by the time of the Revolutionary War offenses such as these long had been defined as distinctively military crimes in the Mutiny Acts. Many of the remainder are identifiably prosecutions for abusing military position by plundering the civil population or abusing its women while on duty. Many of the other cases in which the offense is stealing or assault on an individual were perhaps of this sort also, especially where the victim is referred to as "inhabitant." Most of the rest simply recite the offender and the offense and give no basis for judging the relationship of the offense to military discipline. Those few which do appear to involve civilian crimes in clearly civilian settings appear also to have been committed by officers. In the 18th century at least the "honor" of an officer was thought to give a specific military connection to a crime otherwise without military significance. Moreover, all those courts-martial held between 1773 and 1783 were for the trial of acts committed in wartime and, given the pattern of fighting in those days, in the immediate theater of operations.

of the provision it enacted that it expected the trials would be in civil courts.[15] The "general article," which punished "[a]ll crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war," was interpreted to embrace only crimes the commission of which had some direct impact on military discipline. Winthrop *1123. While practice was not altogether consistent, during the 19th century court-martial convictions for ordinary civil crimes were from time to time set aside by the reviewing authority on the ground that the charges recited only a violation of the general criminal law and failed to state a military offense. *Id.*, *1124, nn. 82, 88.[16]

During the Civil War, Congress provided for military trial of certain civil offenses[17] without regard to their effect on order and discipline, but the act applied only "in time of war, insurrection, or rebellion." Act of Mar. 3, 1863, c. 75, § 30, 12 Stat. 736; Rev. Stat. § 1342, Art. 58 (1874). In 1916, on the eve of World War I, the Articles of War were revised, 39 Stat. 650, to provide for military trial, even in peacetime, of certain specific civil-

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[15] 1776 Articles of War, § 10, Art. 1, reprinted in Winthrop *1494.

[16] Cf. *Ex parte Mason*, 105 U. S. 696, 698, in which the Court, sustaining a court-martial conviction, under the general article, of a military guard who killed a prisoner, said, "[s]hooting with intent to kill is a civil crime, but shooting by a soldier of the army standing guard over a prison, with intent to kill a prisoner confined therein, is not only a crime against society, but an atrocious breach of military discipline."

[17] Larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding by shooting or stabbing with an intent to commit murder, rape, or assault and battery with an intent to commit rape. Rev. Stat. § 1342, Art. 58 (1874).

ian crimes committed by persons "subject to military law" and the general article, Art. 96, was modified to provide for military trial of "all crimes or offenses not capital." In 1950, the Uniform Code of Military Justice extended military jurisdiction to capital crimes as well.

We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," [18] as used

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[18] It has been suggested, at various times, that the phrase "when in actual service in time of War or public danger" should be read to require a grand jury indictment in *all* cases "arising in the land or naval forces, or in the Militia," except when the defendant is in "service in time of War or public danger." It was decided at a very early date, however, that the above clause modifies only "Militia." Thus, the generally accepted rule is that indictment by grand jury is *never* necessary "in cases arising in the land or naval forces" but is necessary for members of the militia, except when they have been "called into the actual Service of the United States" (Art. II, § 2, U. S. Const.) "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, U. S. Const.

"The limitation as to 'actual service in time of war or public danger' relates only to the militia." *Ex parte Mason*, 105 U. S. 696, 701. See also *Smith* v. *Whitney*, 116 U. S. 167, 186; *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *Dynes* v. *Hoover*, 20 How. 65.

Johnson v. *Sayre*, 158 U. S. 109, was a case in which a Navy paymaster sought habeas corpus from his court-martial conviction for embezzlement in time of peace by arguing that he was entitled to indictment by grand jury:

"The decision below is based upon the construction that the words 'when in actual service in time of war or public danger' refer, not merely to the last antecedent, 'or in the militia,' but also to the previous clause, 'in the land or naval forces.' That construction is grammatically possible. But it is opposed to the evident meaning of the provision, taken by itself, and still more so, when it is considered together with the other provisions of the Constitution." *Id.*, at 114. And see *Thompson* v. *Willingham*, 217 F. Supp. 901 (D. C. M. D. Pa.), aff'd, 318 F. 2d 657 (C. A. 3d Cir.).

in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers. The power of Congress to make "Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights. We were advised on oral argument that Art. 134 is construed by the military to give it power to try a member of the armed services for income tax evasion. This article has been called "a catch-all" that "incorporates almost every Federal penal statute into the Uniform Code." R. Everett, Military Justice in the Armed Forces of the United States 68–69 (1956). The catalogue of cases put within reach of the military is indeed long; and we see no way of saving to servicemen and servicewomen in any case the benefits of indictment and of trial by jury, if we conclude that this petitioner was properly tried by court-martial.

In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign coun-

try. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.[19]

We have accordingly decided that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I consider that the terms of the Constitution and the precedents in this Court point clearly to sustaining court-martial jurisdiction in this instance. The Court's largely one-sided discussion of the competing individual and governmental interests at stake, and its reliance upon what are at best wholly inconclusive historical data, fall far short of supporting the contrary conclusion which the majority has reached. In sum, I think that the

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[19] Winthrop in commenting on the phrase "to the prejudice of good order and military discipline" in a predecessor article to Article 134 said:

"A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer, and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses." Pp. *1124–*1125.

Court has grasped for itself the making of a determination which the Constitution has placed in the hands of the Congress, and that in so doing the Court has thrown the law in this realm into a demoralizing state of uncertainty. I must dissent.

I.

My starting point is the language of Art. I, § 8, cl. 14, of the Constitution, which empowers the Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," and the Fifth Amendment's correlative exception for "cases arising in the land or naval forces."

Writing for a plurality of the Court in *Reid* v. *Covert*, 354 U. S. 1 (1957), MR. JUSTICE BLACK explained that if the "language of Clause 14 is given its natural meaning . . . [t]he term 'land and naval Forces' refers to persons who are members of the armed services . . . ," *id.*, at 19–20, and that accordingly the Fifth Amendment's exception encompasses persons " 'in' the armed services." *Id.*, at 22–23. In *Kinsella* v. *Singleton*, 361 U. S. 234 (1960), again looking to the constitutional language, the Court noted that "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense," *id.*, at 243; that is, whether the accused "is a person who can be regarded as falling within the term 'land and naval Forces.' " *Id.*, at 241.

In these cases and many others, *Ex parte Milligan*, 4 Wall. 2, 123 (1866); *Coleman* v. *Tennessee*, 97 U. S. 509 (1879); *Smith* v. *Whitney*, 116 U. S. 167, 184–185 (1886); *Johnson* v. *Sayre*, 158 U. S. 109, 114 (1895); *Grafton* v. *United States*, 206 U. S. 333, 348 (1907), this Court has consistently asserted that military "status" is a necessary *and sufficient* condition for the exercise of court-martial jurisdiction. The Court has never previously questioned what the language of Clause 14 would

seem to make plain—that, given the requisite military status, it is for Congress and not the Judiciary to determine the appropriate subject-matter jurisdiction of courts-martial. See *Coleman* v. *Tennessee, supra,* at 514.

II.

English constitutional history provides scant support for the Court's novel interpretation of Clause 14, and the pertinent American history proves, if anything, quite the contrary.

The English history on which the majority relies reveals a long-standing and multifaceted struggle for power between the military and the Crown, on the one hand, and Parliament on the other, which focused, *inter alia,* on the King's asserted independent prerogative to try soldiers by court-martial in time of peace. See generally J. Tanner, English Constitutional Conflicts of the Seventeenth Century (1961). The martial law of the time was, moreover, arbitrary, and alien to established legal principles. See 1 W. Blackstone's Commentaries 413; M. Hale, History and Analysis of the Common Law in England 42 (6th ed. 1820). Thus, when, with the Glorious Revolution of 1688, Parliament gained exclusive authority to create peacetime court-martial jurisdiction, it exercised that authority sparingly: the early Mutiny Acts permitted trial by court-martial only for the crimes of mutiny, sedition, and desertion. *E. g.,* Mutiny Act of 1689, 1 W. & M., Sess. 2, c. 4.

Parliament subsequently expanded the military's peacetime jurisdiction both abroad and at home. See Mutiny Act of 1712, 12 Anne, c. 13; Mutiny Act of 1803, 43 Geo. 3, c. 20. And, significantly, § 46 of the Mutiny Act of 1720, 7 Geo. 1, c. 6, authorized trial by court-martial for offenses of a nonmilitary nature, if the injured civilian made no request that the accused be tried in the

civil courts. See F. Wiener, Civilians Under Military Justice 13–14, 245–246 (1967).[1]

The burden of English history was not lost on the Framers of our Constitution, who doubtless feared the Executive's assertion of an independent military authority unchecked by the people acting through the Legislature. Article 9, § 4, of the Articles of Confederation—from which Art. I, § 8, cl. 14, of the Constitution was taken[2]—was responsive to this apprehension:

> "The United States in Congress assembled shall . . . have the *sole and exclusive* right and power of . . . making rules for the government and regulation of the . . . land and naval forces, and directing their operations." (Emphasis added.)

But nothing in the debates over our Constitution indicates that the *Congress* was forever to be limited to the precise scope of court-martial jurisdiction existing in 17th century England. To the contrary, Alexander Hamilton stated that Congress' power to prescribe rules for the government of the armed forces "ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them." The Federalist, No. 23. (Emphasis omitted.)

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[1] This proviso was dropped in the Mutiny Act of 1721, 8 Geo. 1, c. 3, and court-martial jurisdiction over such offenses was thereafter limited by the articles of war to, *inter alia*, "Place[s] beyond the Seas . . . where there is no form of Our Civil Judicature in Force." F. Wiener, Civilians Under Military Justice 14 (1967).

[2] See 2 M. Farrand, The Records of the Federal Convention of 1787, p. 330 (1911); 5 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, p. 443 (1836).

American exercise of court-martial jurisdiction prior to, and contemporaneous with, adoption of the Constitution lends no support to the Court's position. Military records between the end of the War of Independence and the beginning of the War of 1812 show frequent instances of trials by court-martial, east of the frontier, for offenses against civilians and the civil laws, such as theft, assault, and killing livestock.[3] Military authority to try soldiers for such offenses derived initially from the "general article" of war, first enacted by the Continental Congress in 1775,[4] and incorporated today in Art. 134, 10 U. S. C. § 934. W. Winthrop's Military Law and Precedents (2d ed. 1896), the leading 19th century treatise on military law, recognized that the general article encompassed crimes "committed upon or against *civilians* . . . at or *near* a military camp or post," *id.*, at 724 (1920

[3] For example: The general orders of George Washington report the trial of soldiers for "killing a Cow . . . , stealing Fowls . . . , and stealing eleven Geese . . . ." 26 Writings of George Washington 73 (Bicent. ed.) (H. Q., Newburgh, January 28, 1783), and "for stealing a number of Shirts and blanketts out of the public store at Newburgh . . . ." *Id.*, at 322 (H. Q., Newburgh, April 15, 1783). The Orderly Books of the Corps of Artillerists and Engineers report the court-martial of Sergeant Harris for "beating a Mr. Williams an inhabitant living near this garrison," Book 1, pp. 157–158 (West Point, October 5, 1795), and of Private Kelly for "abusing and using violence on Mrs. Cronkhyte, a citizen of the United States." Book 3, pp. 45–46 (West Point, July 5, 1796). Numerous other instances of military punishment for nonmilitary crimes during the period 1775–1815 are summarized in the appendix to the Brief for the United States 35–52.

[4] "All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion." W. Winthrop, Military Law and Precedents 957 (2d ed. 1896, 1920 reprint).

reprint) (second emphasis added), and noted that even this limiting principle was not strictly observed. *Id.*, at 725, 730–732. And in *Grafton* v. *United States*, 206 U. S. 333, 348 (1907), the Court held, with respect to the general article, that:

> "The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the . . . article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. . . . [T]he jurisdiction of general courts-martial [is] . . . concurrent with that of the civil courts." [5]

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[5] In 1916, Congress for the first time explicitly authorized peacetime court-martial jurisdiction for specific noncapital offenses. Article 93, Articles of War, 39 Stat. 664. It also revised the general article, renumbered Article 96, to read:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Testifying before the Senate Subcommittee on Military Affairs, Brigadier General Crowder, the Judge Advocate General of the Army, explained the revision (cf. n. 4, *supra*):

"You will notice some transposition of language. The phrase 'to the prejudice of good order and military discipline' is put in in such a way that it qualifies only 'all disorders and neglects.' As the law stands to-day it was often contended that this phrase qualified also 'all crimes not capital.' There was some argument about whether it would reach back through that clause, 'all disorders and neglects,' to the clause 'all crimes not capital' and qualify the latter clause. . . . [B]ut Justice Harlan, in the decision in the Grafton case, seems to have set the matter at rest, and I am

Even if the practice of early American courts-martial had been otherwise, this would hardly lead to the conclusion that Congress lacked power to authorize military trials under the present circumstances. It cannot be seriously argued as a general matter that the constitutional limits of congressional power are coterminous with the extent of its exercise in the late 18th and early 19th centuries.[6] And however restrictively the power to define court-martial jurisdiction may be construed, it would be patently wrong so to limit that power. The disciplinary requirements of today's armed force of over 3,000,000 men[7] are manifestly different from those of the 718-man army[8] in existence in 1789. Cf. The Federalist, No. 23, quoted, *supra*, at 277. By the same token, given an otherwise valid exercise of the Article I power, I can perceive no basis for judicial curtailment of court-martial jurisdiction as Congress has enacted it.

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proposing legislation along the lines of Justice Harlan's decision." Hearings before the Senate Subcommittee on Military Affairs, an Appendix to S. Rep. No. 130, 64th Cong., 1st Sess., 25, 91.

The Act of March 3, 1863, § 30, 12 Stat. 736, authorized punishment for specific nonmilitary crimes, including capital ones, in time of war, insurrection, or rebellion. Article 92 of the 1916 Articles of War, 39 Stat. 664, made murder and rape punishable by death, but provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." This proviso was deleted in the Uniform Code of Military Justice, Articles 118, 120, 10 U. S. C. §§ 918, 920, so that today there is no jurisdictional distinction between capital and noncapital offenses.

[6] On such a theory, for example, Congress could not have permissibly waited, as it did, until 1875, see Act of March 3, 1875, § 1, 18 Stat. 470, to confer general federal-question jurisdiction on the district courts; the present-day exercise of this jurisdiction, see 28 U. S. C. § 1331, would be unconstitutional.

[7] Statistical Abstract of The United States 257 (1968).

[8] R. Weigley, History of the United States Army 566 (1967).

III.

In the light of the language and history of Art. 1, § 8, cl. 14, of the Constitution, and this Court's hitherto consistent interpretation of this provision, I do not believe that the resolution of the controversy before us calls for any balancing of interests. But if one does engage in a balancing process, one cannot fairly hope to come up with a meaningful answer unless the interests on both sides are fully explored. The Court does not do this. Rather, it chooses to ignore strong and legitimate governmental interests which support the exercise of court-martial jurisdiction even over "nonmilitary" crimes.

The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. Furthermore, because its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen.[9] The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty. Thus, as General George Washington recognized:

> "All improper treatment of an inhabitant by an officer or soldier being destructive of good order and

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[9] Congress may also assume the responsibility of protecting civilians from harms perpetrated by members of the armed forces. For the military is often responsible for bringing to a locality thousands of its personnel—whose numbers may be as great as, and sometimes exceed, the neighboring population—thereby imposing on the local law-enforcement agencies a burden which they may be unable to carry.

> discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other." 14 Writings of George Washington 140–141 (Bicent. ed.).

A soldier's misconduct directed against civilians, moreover, brings discredit upon the service of which he is a member:

> "Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position . . . ." *Smith* v. *Whitney*, 116 U. S. 167, 183–184 (1886).

The Government, thus, has a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base, and by rehabilitating offenders to return them to useful military service.[10]

The exercise of military jurisdiction is also responsive to other practical needs of the armed forces. A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the juris-

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[10] Thus, at petitioner's presentence hearing, Captain Powell testified that "through proper rehabilitation, O'Callahan can make a good soldier," Record Transcript 61, and Major Turner testified:

"He has given superior performance, as far as I know. . . . He has gone through school and the Army does have a lot of money wrapped up in this man. . . . I think at this time, here that a rehabilitation program is in order." *Id.*, at 64.

diction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires.

In contrast, a person awaiting trial by court-martial may simply be restricted to limits, and may "participate in all military duties and activities of his organization while under such restriction." Manual for Courts-Martial, United States (1969), ¶20*b*. The trial need not be held in the jurisdiction where the offense was committed. *Id.*, ¶8. See, *e. g.*, *United States* v. *Voorhees*, 4 U. S. C. M. A. 509, 515, 16 C. M. R. 83, 89 (1954); cf. *United States* v. *Gravitt*, 5 U. S. C. M. A. 249, 256, 17 C. M. R. 249, 256 (1954). And punishments—such as forfeiture of pay, restriction to limits, and hard labor without confinement—may be imposed that do not keep the convicted serviceman from performing his military duties. See Manual for Courts-Martial, *supra*, ¶¶126 *g*, *h*, *k*.

IV.

The Court does not explain the scope of the "service-connected" crimes as to which court-martial jurisdiction is appropriate, but it appears that jurisdiction may extend to "nonmilitary" offenses in appropriate circumstances. Thus, the Court intimates that it is relevant to the jurisdictional issue in this case that petitioner was wearing civilian clothes rather than a uniform when he committed the crimes. *Ante*, at 259. And it also implies that plundering, abusing, and stealing from, civilians may sometimes constitute a punishable abuse of military position, *ante*, at 270, n. 14, and that officers may be court-martialed for purely civilian crimes, because "[i]n the 18th century . . . the 'honor' of an officer was thought to give a specific military connection to a crime otherwise without military significance." [11] *Ibid.* But if these

[11] It is, to say the least, strange that as a *constitutional* matter the military is without authority to discipline an enlisted man for an offense that is punishable if committed by an officer.

are illustrative cases, the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible.

Whatever role an *ad hoc* judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance. Absolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created.

I would affirm the judgment of the Court of Appeals.

Syllabus.

GASTON COUNTY, NORTH CAROLINA *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 701. Argued April 23–24, 1969.—Decided June 2, 1969.

The Voting Rights Act of 1965 suspends the use of any test or device as a prerequisite to registering to vote, in any State or political subdivision which, on November 1, 1964, maintained a test or device and in which less than 50% of the voting-age residents were registered or voted in the 1964 presidential election. Suspension is automatic upon publication by the Attorney General and the Director of the Census, respectively, that these conditions apply to a particular governmental unit. Such determinations were published with respect to Gaston County, North Carolina, and the use of the State's literacy test within the County was thereby suspended. Appellant brought suit to reinstate the test, asserting in accord with § 4 (a) of the Act "that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The Government contended that use of the test did have the "effect of denying or abridging the right to vote on account of race or color" because it placed an onerous burden on the Negroes for whom the County had maintained separate and inferior schools. The three-judge District Court denied relief, holding that the County had not met its burden of proving that its use of the literacy test, in the context of its historic maintenance of segregated and unequal schools, did not discriminatorily deprive Negroes of the franchise. *Held:*

1. The Act's legislative history discloses that Congress was aware of the potential effect of unequal educational opportunities upon the right to vote when it designed the test-suspension provisions, and it is appropriate in an action under § 4 (a) for a court to consider whether a literacy or educational requirement has the "effect of denying the right to vote on account of race or color" because the State or subdivision seeking to impose the requirement has maintained separate and inferior schools for its Negro citizens who are now of voting age. Pp. 289–293.

2. The District Court's conclusion that appellant had not met the burden imposed by § 4 (a) of refuting the Government's prima facie case that the use of the literacy test coupled with the County's segregated and unequal school system had discriminatorily deprived Negroes of the franchise, was not clearly erroneous. Pp. 293–296.

3. Appellant's contentions that reregistration in 1962 was conducted fairly and impartially and that significant strides have been made in equalizing and integrating its school system do not refute the fact that for many years the County deprived its black citizens of the educational opportunities it granted its white citizens and that "impartial" administration of the literacy test today would perpetuate those inequities in another form. Pp. 296–297.

288 F. Supp. 678, affirmed.

Grady B. Stott argued the cause for appellant. With him on the brief was *Wesley E. McDonald, Sr.*

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Leonard, Francis X. Beytagh, Jr.*, and *David L. Norman.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The Voting Rights Act of 1965 suspends the use of any test or device[1] as a prerequisite to registering to vote in any election, in any State or political subdivision which, on November 1, 1964, maintained a test or device, and in which less than 50% of the residents of voting age were registered on that date or voted in the 1964 presi-

[1] "The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." Voting Rights Act of 1965, § 4 (c), 79 Stat. 438, 42 U. S. C. § 1973b (c) (1964 ed., Supp. III).

dential election.[2] Suspension is automatic upon publication in the Federal Register of determinations by the Attorney General and the Director of the Census, respectively, that these conditions apply to a particular governmental unit. If the unit wishes to reinstate the test or device, it must bring suit against the Government in a three-judge district court in the District of Columbia and prove "that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color," § 4 (a). The constitutionality of these provisions was upheld in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966).

On March 29, 1966, the Attorney General and the Director of the Census published the necessary determinations with respect to appellant, Gaston County, North Carolina. Use of the State's literacy test [3] within the County was thereby suspended. On August 18, 1966, appellant brought this action in the District Court, making the requisite averments and seeking to reinstate the literacy test.

The United States opposed the granting of relief on the ground, *inter alia*, that use of the test had "the effect of denying or abridging the right to vote on account of race or color" because it placed a specially onerous burden on the County's Negro citizens for whom the County had maintained separate and inferior schools.

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[2] § 4 (a), 79 Stat. 438, 42 U. S. C. § 1973b (a) (1964 ed., Supp. III).

[3] N. C. Const., Art. VI, § 4, provides: "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language." At all times relevant to this case, N. C. Gen. Stat. § 163-28 mirrored the constitutional provision. In 1967 the statute was renumbered § 163-58 and its wording was amended in minor aspects.

After a full trial on this and other issues, the District Court denied the relief requested, holding that appellant had not met its burden of proving that its use of the literacy test, in the context of its historic maintenance of segregated and unequal schools, did not discriminatorily deprive Negroes of the franchise.[4] *Gaston County* v. *United States,* 288 F. Supp. 678 (1968). The court made clear:

> "[W]e do not rely solely on the fact that the schools in Gaston County have been segregated during the period when persons presently of voting age were of school age, but instead have reviewed the evidence adduced by the Government *in this case* and concluded that the Negro schools were of inferior quality in fact as well as in law." *Id.*, at 689–690, n. 23.

Pursuant to § 4 (a) of the Act, the County appealed directly to this Court. We noted probable jurisdiction, 393 U. S. 1011 (1969), and we affirm for substantially the reasons given by the majority in the District Court.

Appellant contends that the decision of the District Court is erroneous on three scores: first, as a matter of statutory construction and legislative history, the court could not consider Gaston County's practice of educational discrimination in determining whether its literacy test had the effect of discriminatorily denying the franchise; second, on the facts of this case, appellant met its burden of proving that the education it provided had no such effect; and third, whatever may have been the situation in the past, Gaston County has not fostered discrimination in education or voting in recent years. We consider these arguments in turn.

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[4] Judge Wright wrote the majority opinion, in which Judge Robinson joined. Judge Gasch dissented from the court's holding, see *infra*, at 290–291, but would have denied appellant relief for different reasons.

I.

The legislative history of the Voting Rights Act of 1965 discloses that Congress was fully cognizant of the potential effect of unequal educational opportunities upon exercise of the franchise. This causal relationship was, indeed, one of the principal arguments made in support of the Act's test-suspension provisions. Attorney General Katzenbach testified before the Senate Committee on the Judiciary:

> "It might be suggested that this kind of [voting] discrimination could be ended in a different way—by wiping the registration books clean and requiring all voters, white or Negro, to register anew under a uniformly applied literacy test.
>
> ". . . [S]uch an approach would not solve, but would compound our present problems.
>
> "To subject every citizen to a higher literacy standard would, inevitably, work unfairly against Negroes—Negroes who have for decades been systematically denied educational opportunity equal to that available to the white population. Although the discredited 'separate but equal' doctrine had colorable constitutional legitimacy until 1954, the notorious and tragic fact is that educational opportunities were pathetically inferior for thousands of Negroes who want to vote today.
>
> "The impact of a general reregistration would produce a real irony. Years of violation of the 14th amendment, right of equal protection through equal education, would become the excuse for continuing violation of the 15th amendment, right to vote." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 22.

Mr. Katzenbach testified similarly before the House Committee. See Hearings on H. R. 6400 before Sub-

committee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 18–19, 49. And significantly, the Report of the Senate Judiciary Committee explicitly asserted:

> "[T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the committee—would mean that equal application of the tests would abridge 15th amendment rights. This advantage to whites is directly attributable to the States and localities involved." S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 16.[5]

Appellant's response to this seemingly unequivocal legislative history is, in essence, that it proves too much. As Judge Gasch put it in his separate opinion below:

> "[I]t is clear that the Voting Rights Act was primarily directed at the Southern states. In the Act, the Congress allowed a fair opportunity for a certified unit to rebut the presumption that its literacy test was used in a discriminatory manner. Thus, sections 4 and 5 of the Act provide a procedure whereby a State or political subdivision which has been the subject of a certification under the Act, may petition this Court for declaratory relief to reinstate its test before the five-year suspension period

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[5] In view of this obvious relationship, and acknowledgment of it by the Attorney General and Congress, it is of no consequence that the Act was explicitly designed to enforce the Fifteenth, and not the Fourteenth, Amendment. See, *e. g.*, Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 141–142; Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 49–50, 66, 102. The Act was, of course, concerned solely with voting rights, and discrimination in education bears on the Act only insofar as it may result in discriminatory abridgment of the franchise.

has elapsed. Sections 4 and 5 will provide no remedy to a Southern state, however, if, as the majority finds, a segregated school system coupled with census data showing higher literacy and education for whites than for Negroes, is sufficient to preclude recovery under the Act. We can take judicial notice that the segregated school system was the prevailing system throughout the South. If this were what Congress had in mind, it would have stated that no test could be used where literacy was higher among whites than among Negroes. I do not believe that Congress intended that the Act be interpreted in such a way as to render §§ 4 and 5 inapplicable to Southern states or those which had segregated educational systems." 288 F. Supp., at 690, 695.

Appellant's contentions fundamentally misconceive the import of the majority opinion below, as we read it. That opinion explicitly disclaims establishing any *per se* rule. The court's decision is premised not merely on Gaston County's historic maintenance of a dual school system, but on substantial evidence that the County deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test. Consistent with the court's holding, a State or subdivision may demonstrate that although its schools suffered from the inequality inherent in any segregated system, see *Brown* v. *Board of Education,* 347 U. S. 483 (1954), the dual educational system had no appreciable discriminatory effect on the ability of persons of voting age to meet a literacy requirement.

It is of no consequence that Congress *might* have dealt with the effects of educational discrimination by employing a coverage formula different from the one it enacted. The coverage formula chosen by Congress was designed to

be speedy, objective, and incontrovertible; [6] it is triggered appropriately by voting or registration figures. The areas at which the Act was directed

> "share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 330 (1966).

In contrast, a coverage formula based on educational disparities, or one based on literacy rates, would be administratively cumbersome: the designation of racially disparate school systems is not susceptible of speedy, objective, and incontrovertible determination; and the Bureau of the Census collects no accurate county statistics on literacy. Furthermore, a coverage formula based on either of these factors would not serve as an appropriate basis for suspending all of the tests and devices encompassed by § 4 (c) of the Act—for example, a "good moral character" requirement.[7]

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[6] Section 4 (b) of the Act makes the determinations by the Attorney General and the Director of the Census unreviewable in any court. "[T]he findings not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 333 (1966).

[7] See n. 1, *supra;* Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 30–31.

We conclude that in an action brought under § 4 (a) of the Voting Rights Act of 1965, it is appropriate for a court to consider whether a literacy or educational requirement has the "effect of denying . . . the right to vote on account of race or color" because the State or subdivision which seeks to impose the requirement has maintained separate and inferior schools for its Negro residents who are now of voting age.[8]

II.

In an action for declaratory relief under § 4 (a) of the Voting Rights Act of 1965, the plaintiff carries the burden of proof. The plaintiff cannot be expected to raise and refute every conceivable defense, however, cf. Federal Rules of Civil Procedure, Rule 9 (c), and it was incumbent upon the Government in the case at bar to put into issue its contention that appellant's use of the literacy test, coupled with its racially segregated and unequal school system, discriminatorily deprived Negroes of the franchise. The plaintiff-appellant would then have the burden of proving the contrary. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 332 (1966). The Government did place this contention in issue, and in support thereof it introduced considerable evidence, which we now summarize.

All persons of voting age in 1966 who attended schools in Gaston County[9] attended racially separate and un-

[8] We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility.

[9] We assume, and appellant does not suggest otherwise, that most of the adult residents of Gaston County resided there as children. Cf. Bureau of the Census, 1960 Census of Population, Vol. I, pt. 35, table 39. It would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems.

equal schools.[10] Between the years 1908 and 1929, when approximately 45% of the voting age population was of school age, the salaries of Negro teachers in the County ranged from a low of about 20% to a high of about 50% of those of their white colleagues. In 1919, when uniform teacher certification was first required in North Carolina, 98% of the white teachers, but only 5% of the Negro teachers, qualified for regular state teaching certificates. The remaining 95% of the Negro teachers held "second grade" certificates. The Biennial Report of the State Superintendent of Public Instruction, 1918–1920, described a second grade certificate as "the lowest permit issued to any teacher in the State. It is not a certificate in the proper sense, but merely a permit to teach until someone can be found who is competent to take the place."

During this same period, the per-pupil valuation of Negro school property in the County ranged from 20% to about 40% of that of the white schools. A much higher proportion of Negro than of white children attended one-room, one-teacher, wooden schoolhouses which contained no desks.

By the 1938–1939 school year, Negro teachers' salaries had increased to about 70% of that of white teachers, and by the 1948–1949 school year, salaries were almost equal. At this later date, the per-pupil valuation of Negro school property was still only about one-third that of the white schools.

Of those persons over 25 years old at the time of the 1960 census, the proportion of Negroes with no schooling

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[10] *Gaston County* v. *United States*, 288 F. Supp. 678, 686 (1968). Unless otherwise indicated, the facts and statistics set out below, which are not controverted, appear in the opinion of the District Court, 288 F. Supp., at 686–687, or in Government's Exhibit No. 2 (Excerpts from the Reports of the Superintendent of Public Instruction of North Carolina).

whatever was twice that of whites in Gaston County; the proportion of Negroes with four or less years of education was slightly less than twice that of whites.

In 1962, Gaston County changed its system of registration and required a general reregistration of all voters. North Carolina law provides that "[e]very person presenting himself for registration shall be able to read and write any section of the Constitution in the English language." N. C. Const., Art. VI, § 4; see n. 3, *supra*. The State Supreme Court has described this requirement as "relatively high, even after more than a half century of free public schools and universal education," *Bazemore* v. *Bertie County Board of Elections*, 254 N. C. 398, 402, 119 S. E. 2d 637, 641 (1961),[11] and a Negro minister active in voter registration testified that it placed an especially heavy burden on the County's older Negro citizens. Appendix 131–132. It was publicized throughout the County that the literacy requirement would be enforced. A registrar told a Negro leader not to bring illiterates to register. Some Negroes who attempted to register were, in fact, rejected because they could not pass the test, and others did not attempt to register, knowing that they could not meet the standard.

With this evidence, the Government had not only put its contention in issue, but had made out a prima facie case. It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries.[12] And on the Government's showing, it was certainly proper

[11] Elsewhere in its opinion, the court stated that a registrant must be able to read aloud, as well as copy, a section of the State Constitution. 254 N. C., at 404, 119 S. E. 2d, at 642. Appellant's registrars required only that a registrant copy one of three sentences of the Constitution.

[12] This is, indeed, an inference that appears throughout the Act's legislative history. See *supra*, at 289–290.

to infer that Gaston County's inferior Negro schools provided many of its Negro residents with a subliterate education, and gave many others little inducement to enter or remain in school.

The only evidence introduced by the appellant in rebuttal was the testimony of Thebaud Jeffers, a Negro principal of a Negro high school, who had first come to Gaston County in 1932. He stated that "[a]ll of our schools . . . would have been able to teach any Negro child to read and write so that he could read a newspaper, so that he could read any simple material," and so that he could pass the literacy test. Appendix 169.

The District Court characterized Mr. Jeffers as an "interested witness," and found his testimony "unpersuasive" when measured against the Government's evidence. The court further noted that the principal's knowledge about the school system dated only from 1932, by which time some of the more blatant educational disparities were being reduced. Almost one-half of the county's black adults were of school age well before Mr. Jeffers' arrival.

The District Court concluded that appellant had not met the burden imposed by § 4 (a) of the Voting Rights Act of 1965. This was not clearly erroneous.

III.

Appellant urges that it administered the 1962 reregistration in a fair and impartial manner, and that in recent years it has made significant strides toward equalizing and integrating its school system. Although we accept these claims as true, they fall wide of the mark. Affording today's Negro youth equal educational opportunities will doubtless prepare them to meet, on equal terms, whatever standards of literacy are required when they reach voting age. It does nothing for their parents, however. From this record, we cannot escape the sad

truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.

The judgment of the District Court is

Affirmed.

MR. JUSTICE BLACK dissents for substantially the same reasons he stated in § (b) of his separate opinion in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 355, 358.

DANIEL ET AL. *v.* PAUL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 488. Argued March 24–25, 1969.—Decided June 2, 1969.

Lake Nixon Club is an amusement place owned by respondent and his wife, located 12 miles from Little Rock, Ark. It has recreation facilities, including swimming, boating, and dancing, and a snack bar serving four food items, at least three of which contain ingredients coming from outside the State. The Club leases 15 paddle boats on a royalty basis from an Oklahoma company (from which it purchased one boat) and operates a juke box which, along with records it plays, is manufactured outside Arkansas. The Club is advertised in a monthly magazine distributed at Little Rock hotels, motels, and restaurants, in a monthly newspaper published at a nearby Air Force base, and over two area radio stations. Approximately 100,000 whites patronize the establishment each season and are routinely furnished "membership" cards in the "club," on payment of a 25¢ fee. Negroes are denied admission. Petitioners, Negro residents of Little Rock, brought this class action to enjoin respondent from denying them admission to the Lake Nixon Club, alleging that it is a "public accommodation" subject to the provisions of Title II of the Civil Rights Act of 1964, and that respondent violated the Act by refusing petitioners admission solely on racial grounds. Title II prohibits racial discrimination at places of public accommodation whose operations affect commerce. The District Court, though finding that petitioners had been refused admission solely because they were Negroes and that the Lake Nixon Club is not a private club (to which Title II does not apply), dismissed the complaint on the ground that the establishment is not a "public accommodation" within the meaning of the Act. The Court of Appeals affirmed. Section 201 (b) of the Act includes among the categories of covered public accommodations: "(2) any restaurant, . . . lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises . . . ," "(3) any . . . place of . . . entertainment," and "(4) any establishment . . . within the premises of which is physically located any such covered establishment, and . . . which holds itself out as serving patrons of such covered establishment." Under § 201 (c) a place of public accommodation

affects commerce if "(2) . . . [it is an establishment described in § 201 (b)(2) and] serves or offers to serve interstate travelers or a substantial portion of the food it serves . . . has moved in commerce; (3) [it is an establishment described in § 201 (b)(3) and] customarily presents films, performances, . . . or other sources of entertainment which move in commerce;" or "(4) [it is an establishment described in § 201 (b)(4) and] there is physically located within its premises, an establishment the operations of which affect commerce . . . ." *Held:*

1. Lake Nixon Club, as the courts below correctly held, is not a private club since it routinely affords "membership" to all whites and has none of the attributes of self-government and member-ownership traditionally associated with private clubs. Pp. 301–302.

2. The Lake Nixon Club's snack bar is a "place of public accommodation" under § 201 (b)(2) of the Act since it is "principally engaged in selling food for consumption on the premises." Pp. 302–304.

3. The operations of the snack bar "affect commerce" under § 201 (c)(2) of the Act. P. 304.

(a) The owners' choice of advertising media leaves no doubt that they seek a broad-based patronage from an audience they know includes interstate travelers; and it would be unrealistic to assume that none of the 100,000 patrons served each season is an interstate traveler. P. 304.

(b) A "substantial portion of the food" served at the snack bar has moved in interstate commerce. P. 305.

4. The snack bar's status as a covered establishment automatically brings the entire Lake Nixon Club facility within the coverage of Title II of the Act by virtue of §§ 201 (b)(4) and 201 (c)(4). P. 305.

5. The Lake Nixon Club is a covered accommodation under §§ 201 (b)(3) and 201 (c)(3) of the Act as it is a "place of entertainment," which, in the light of the overriding purpose of Title II to remove discriminatory denials of access to public facilities, includes recreational areas and is not, as respondent argues, limited to spectator entertainment. Pp. 305–308.

6. The Club's operations clearly "affect commerce" within the meaning of § 201 (c)(3) since the paddle boats and the juke box and its records are "sources of entertainment [that] move in commerce." P. 308.

395 F. 2d 118, reversed.

Conrad K. Harper argued the cause for petitioners *pro hac vice*. With him on the brief were *Jack Greenberg*, *James M. Nabrit III*, and *Norman C. Amaker*.

James W. Gallman, by invitation of the Court, 393 U. S. 1061, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

Assistant Attorney General Leonard argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold* and *Louis F. Claiborne*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, Negro residents of Little Rock, Arkansas, brought this class action in the District Court for the Eastern District of Arkansas to enjoin respondent from denying them admission to a recreational facility called Lake Nixon Club owned and operated by respondent, Euell Paul, and his wife. The complaint alleged that Lake Nixon Club was a "public accommodation" subject to the provisions of Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a *et seq.*, and that respondent violated the Act in refusing petitioners admission solely on racial grounds.[1] After trial, the District Court, although finding that respondent had refused petitioners admission solely because they were Negroes,[2]

[1] Petitioners alleged that the denial of admission also constitutes a violation of the Civil Rights Act of 1866, as amended, 14 Stat. 27, now 42 U. S. C. § 1981. Neither the District Court nor the Court of Appeals passed on this contention. Our conclusion makes it unnecessary to consider the question.

[2] Respondent at trial answered affirmatively a question of the trial judge whether Negroes were denied admission "simply . . . because they were Negroes." Respondent's answer to an interrogatory why Negroes were refused admission was: "[w]e refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it."

dismissed the complaint on the ground that Lake Nixon Club was not within any of the categories of "public accommodations" covered by the 1964 Act. 263 F. Supp. 412 (1967). The Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. 395 F. 2d 118 (1968). We granted certiorari. 393 U. S. 975 (1968). We reverse.

Lake Nixon Club, located 12 miles west of Little Rock, is a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar. The Pauls purchased the Lake Nixon site in 1962 and subsequently operated this amusement business there in a racially segregated manner.

Title II of the Civil Rights Act of 1964 enacted a sweeping prohibition of discrimination or segregation on the ground of race, color, religion, or national origin at places of public accommodation whose operations affect commerce.[3] This prohibition does not extend to discrimination or segregation at private clubs.[4] But, as both courts below properly found, Lake Nixon is not a private club. It is simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs. It is true that following enactment of the Civil Rights Act of 1964, the Pauls began to refer to the establishment as a private club. They even began to require

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[3] Section 201 (a) of the Act provides:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

[4] Section 201 (e) of the Act provides:

"The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b)."

patrons to pay a 25-cent "membership" fee, which gains a purchaser a "membership" card entitling him to enter the Club's premises for an entire season and, on payment of specified additional fees, to use the swimming, boating, and miniature golf facilities. But this "membership" device seems no more than a subterfuge designed to avoid coverage of the 1964 Act. White persons are routinely provided "membership" cards, and some 100,000 whites visit the establishment each season. As the District Court found, Lake Nixon is "open in general to all of the public who are members of the white race." 263 F. Supp., at 418. Negroes, on the other hand, are uniformly denied "membership" cards, and thus admission, because of the Pauls' fear that integration would "ruin" the "business." The conclusion of the courts below that Lake Nixon is not a private club is plainly correct—indeed, respondent does not challenge that conclusion here.

We therefore turn to the question whether Lake Nixon Club is "a place of public accommodation" as defined by § 201 (b) of the 1964 Act, and, if so, whether its operations "affect commerce" within the meaning of § 201 (c) of that Act.

Section 201 (b) defines four categories of establishments as covered public accommodations. Three of these categories are relevant here:

> "Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . . .
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> . . . . . .
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such

facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) . . . (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201 (c) sets forth standards for determining whether the operations of an establishment in any of these categories affect commerce within the meaning of Title II:

"The operations of an establishment affect commerce within the meaning of this title if . . . (2) in the case of an establishment described in paragraph (2) [set out *supra*] . . . , it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) [set out *supra*] . . . , it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) [set out *supra*] . . . , there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States . . . ."

Petitioners argue first that Lake Nixon's snack bar is a covered public accommodation under §§ 201 (b)(2) and 201 (c)(2), and that as such it brings the entire establish-

ment within the coverage of Title II under §§ 201 (b)(4) and 201 (c)(4). Clearly, the snack bar is "principally engaged in selling food for consumption on the premises." Thus, it is a covered public accommodation if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." We find that the snack bar is a covered public accommodation under either of these standards.

The Pauls advertise the Lake Nixon Club in a monthly magazine called "Little Rock Today," which is distributed to guests at Little Rock hotels, motels, and restaurants, to acquaint them with available tourist attractions in the area. Regular advertisements for Lake Nixon were also broadcast over two area radio stations. In addition, Lake Nixon has advertised in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, in Jacksonville, Arkansas. This choice of advertising media leaves no doubt that the Pauls were seeking broad-based patronage from an audience which they knew to include interstate travelers. Thus, the Lake Nixon Club unquestionably offered to serve out-of-state visitors to the Little Rock area. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler.[5] Since the Lake Nixon Club offered to serve and served out-of-state persons, and since the Club's snack bar was established to serve all patrons of the entire facility, we must conclude that the snack bar offered to serve and served out-of-state persons. See *Hamm* v. *Rock Hill,* 379 U. S. 306, 309 (1964); see also *Wooten* v. *Moore,* 400 F. 2d 239 (C. A. 4th Cir. 1968).

[5] The District Court, which did not find it necessary to decide whether the snack bar served or offered to serve interstate travelers, conceded that: "It is probably true that some out-of-State people spending time in or around Little Rock have utilized [Lake Nixon's] facilities." 263 F. Supp., at 418.

The record, although not as complete on this point as might be desired, also demonstrates that a "substantial portion of the food" served by the Lake Nixon Club snack bar has moved in interstate commerce. The snack bar serves a limited fare—hot dogs and hamburgers on buns, soft drinks, and milk. The District Court took judicial notice of the fact that the "principal ingredients going into the bread were produced and processed in other States" and that "certain ingredients [of the soft drinks] were probably obtained . . . from out-of-State sources." 263 F. Supp., at 418. Thus, at the very least, three of the four food items sold at the snack bar contain ingredients originating outside of the State. There can be no serious doubt that a "substantial portion of the food" served at the snack bar has moved in interstate commerce. See *Katzenbach* v. *McClung*, 379 U. S. 294, 296–297 (1964); *Gregory* v. *Meyer*, 376 F. 2d 509, 511, n. 1 (C. A. 5th Cir. 1967).

The snack bar's status as a covered establishment automatically brings the entire Lake Nixon facility within the ambit of Title II. Civil Rights Act of 1964, §§ 201 (b)(4) and 201 (c)(4), set out *supra;* see H. R. Rep. No. 914, 88th Cong., 1st Sess., 20; *Fazzio Real Estate Co.* v. *Adams*, 396 F. 2d 146 (C. A. 5th Cir. 1968).[6]

Petitioners also argue that the Lake Nixon Club is a covered public accommodation under §§ 201 (b)(3) and 201 (c)(3) of the 1964 Act. These sections proscribe discrimination by "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment" which "customarily presents films, performances, athletic teams,

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[6] Accord: *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474 (D. C. E. D. Va. 1966); *United States* v. *Fraley*, 282 F. Supp. 948 (D. C. M. D. N. C. 1968); *United States* v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300 (D. C. S. C. 1968).

exhibitions, or other sources of entertainment which move in commerce." Under any accepted definition of "entertainment," the Lake Nixon Club would surely qualify as a "place of entertainment." [7] And indeed it advertises itself as such.[8] Respondent argues, however, that in the context of § 201 (b)(3) "place of entertainment" refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity. We find no support in the legislative history for respondent's reading of the statute. The few indications of legislative intent are to the contrary.

President Kennedy, in submitting to Congress the public accommodations provisions of the proposed Civil Rights Act, emphasized that "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, *recreational areas* and other public accommodations and facilities." [9] (Emphasis added.) While Title II was being considered by the Senate, a civil rights demonstration occurred at a Maryland amusement park. The then Assistant Majority Leader of the Senate, Hubert Humphrey, took note of the demonstration and opined that such an amusement

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[7] Webster's Third New International Dictionary, at 757, defines "entertainment" as "the act of diverting, amusing, or causing someone's time to pass agreeably: [synonymous with] amusement."

[8] Respondent advertised over a local radio station that "Lake Nixon continues their policy of offering you year-round entertainment."

[9] Special Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963, in Public Papers of the Presidents, John F. Kennedy, 1963, at 485. This statement was originally made in a Special Message to the Congress on Civil Rights, Feb. 28, 1963, in Public Papers, *supra*, at 228.

park would be covered by the provisions which were eventually enacted as Title II:

> "In this particular instance, I am confident that merchandise and facilities used in the park were transported across State lines.
>
> . . . . .
>
> "The spectacle of national church leaders being hauled off to jail in a paddy wagon demonstrates the absurdity of the present situation regarding equal access to public facilities in Maryland and the absurdity of the arguments of those who oppose title II of the President's omnibus civil rights bill." 109 Cong. Rec. 12276 (1963).

Senator Magnuson, floor manager of Title II, spoke in a similar vein.[10]

Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather than recreational areas. But it does not follow that the scope of § 201 (b)(3) should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage. In light of the overriding purpose of Title II "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities

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[10] "Motion picture theaters which refuse to admit Negroes will obviously draw patrons from a narrower segment of the market than if they were open to patrons of all races. . . . Thus, the demand for films from out of State, and the royalties from such films, will be less.

. . . . .

"These principles are applicable not merely to motion picture theaters but to *other establishments which receive supplies, equipment, or goods through the channels of interstate commerce.* If these establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less." (Emphasis added.) 110 Cong. Rec. 7402 (1964).

ostensibly open to the general public," H. R. Rep. No. 914, 88th Cong., 1st Sess., 18, we agree with the *en banc* decision of the Court of Appeals for the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (1968), that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning and applied to recreational areas.

The remaining question is whether the operations of the Lake Nixon Club "affect commerce" within the meaning of § 201 (c)(3). We conclude that they do. Lake Nixon's customary "sources of entertainment . . . move in commerce." The Club leases 15 paddle boats on a royalty basis from an Oklahoma company. Another boat was purchased from the same company. The Club's juke box was manufactured outside Arkansas and plays records manufactured outside the State. The legislative history indicates that mechanical sources of entertainment such as these were considered by Congress to be "sources of entertainment" within the meaning of § 201 (c)(3).[11]

Reversed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I also rest on the Fourteenth Amendment. My views were set forth in *Bell* v. *Maryland*, 378 U. S. 226, 242, where I said:

> "Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship.

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[11] The Senate rejected an amendment which would have ruled out most mechanical sources by requiring that the source of entertainment be one which has "not come to rest within a State." 110 Cong. Rec. 13915–13921 (1964). See also the remarks of Senator Magnuson, *supra*, n. 10.

> It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States." *Id.*, 260.

And see my concurring opinion in *Atlanta Motel* v. *United States*, 379 U. S. 241, 279 *et seq.*

MR. JUSTICE BLACK, dissenting.

I could and would agree with the Court's holding in this case had Congress in the 1964 Civil Rights Act based its power to bar racial discrimination at places of public accommodations upon § 5 of the Fourteenth Amendment.[1] But Congress in enacting this legislation did not choose to invoke this broad Fourteenth Amendment power to protect against racial discrimination; instead it tied the Act and limited its protection to congressional power to regulate commerce among the States. Both courts below found that respondent's swimming and recreational place is covered by the Act if its operations "affect commerce" within the meaning of § 201 (c) of the Act. The Act itself, in § 201 (c), provides the test for determining whether this respondent's recreational operations adversely affect interstate commerce. That test is to determine from evidence whether the operation of an establishment like respondent's (a) "serves or offers to serve interstate travelers" or (b) "a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce . . . ." In order, therefore, for the Act to be held to apply the test must be shown to be met by evidence and judicial

[1] "The Congress shall have power to enforce by appropriate legislation, the provisions of this article." U. S. Const., Amdt. XIV, § 5. See concurring opinion of Mr. Justice Clark, which I joined, in *United States* v. *Guest*, 383 U. S. 745, 761.

findings, not by guesswork, or assumptions, or "judicial knowledge" of crucially relevant facts, or by unproved probabilities or possibilities. My trouble with the Court's holding is that it runs roughshod over District Court findings supported by the record and emphatically affirmed by the Court of Appeals. Let us briefly review the facts and findings on the foregoing two separate conditions of the Act's applicability.

(A) Did Lake Nixon serve or offer to serve interstate travelers? There is not a word of evidence showing that such an interstate traveler was ever there or ever invited there or ever dreamed of going there. Nixon Lake can be reached only by country roads. The record fails to show whether these country roads are passable in all kinds of weather. They seem to be at least six to eight miles off the state or interstate roads over which interstate travelers are accustomed to travel. Petitioners did not offer evidence to show whether Lake Nixon is a natural lake, or whether it is simply a small body of water obtained by building a dam across a little creek in a narrow hollow between the hills. The District Court made findings about Lake Nixon and Spring Lake [2] as follows:

> "Both are accessible by country roads; neither is located on or near a State or federal highway. There is no evidence that either facility has ever tried to attract interstate travelers as such, and the location of the facilities is such that it would be in the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing either establishment." 263 F. Supp. 412, 418.

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[2] The District Court held hearings and made findings concerning Lake Nixon and another establishment, Spring Lake, in a single trial. No appeal was taken from the District Court's decision holding that Spring Lake was not covered by the Act.

The foregoing finding is not impaired by this additional statement of the District Judge:

> "Of course, it is probably true that some out-of-State people spending time in or around Little Rock have utilized one or both facilities." *Ibid.*

In the first place the court's statement that "it is probably true" takes this out of the category of a finding of fact; and secondly, "out-of-State people spending time in or around Little Rock" who happened to visit Lake Nixon would certainly not be the kind of "interstate travelers" doing the kind of interstate traveling that would "affect" interstate commerce.

The Court of Appeals, affirming the findings of the District Court, said:

> "There is no evidence that any interstate traveler ever patronized this facility, or that it offered to serve interstate travelers . . . ." 395 F. 2d 118, 127.

This Court rejects these joint findings of the two courts below in this way. Referring to advertisements of Lake Nixon in a monthly magazine distributed at Little Rock hotels, motels, and restaurants, to radio announcements, and to advertisements in the "Little Rock Air Force Base," this Court says:

> "Thus, the Lake Nixon Club unquestionably offered to serve out-of-state visitors to the Little Rock area. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler."

In the above statement this Court jumps from the fact that there were an estimated number of admissions onto the club premises during a season to the conclusion that some one or more of these was an "interstate traveler" and that the owners of the premises, Mr. and Mrs. Paul, were bound to know that there were interstate travelers

present.[3] That conclusion is far too speculative to be used as a means of rejecting the solemn findings of the two courts below. If the facts here are to be left to such "iffy" conjectures, one familiar with country life and traveling would, it seems to me, far more likely conclude that travelers on interstate journeys would stick to their interstate highways, and not go miles off them by way of what, for all this record shows, may well be dusty, unpaved, "country" roads to go to a purely local swimming hole where the only food they could buy was hamburgers, hot dogs, milk, and soft drinks (but not beer). This is certainly not the pattern of interstate movements I would expect interstate travelers in search of tourist attractions to follow.

(B) The second prong of the test to determine applicability of the Act to Lake Nixon is whether a "substantial portion" of the hamburgers, milk, and soda pop sold there had previously moved in interstate commerce. The Court's opinion generously concedes that the record is "not as complete on this point as might be desired . . . ." This is certainly no exaggeration. In fact, I would go further and agree with the two courts below that the record is totally devoid of evidence to show that a "substantial portion" of the small amount of food sold had previously moved in interstate commerce. The District Court found as follows on this point:

> "Food and soft drinks are purchased locally by both establishments. The record before the Court does not disclose where or how the local suppliers obtained the products which they sold to the establishments. The meat products sold by defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. The bread

[3] In fact, Mr. Paul testified under oath that no interstate travelers were members of the "club," that they had not invited any to join, and that as far as he knew, none had ever used the premises.

> used by defendants was baked and packaged locally, but judicial notice may be taken of the fact that the principal ingredients going into the bread were produced and processed in other States. The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources." 263 F. Supp., at 418.

Fact-findings on serious problems like this one, which involves marking the jurisdictional authority of State and Nation, should not be made on the basis of "judicial notice" and on probabilities not based on evidence. The Court of Appeals approved this finding of the District Court that a substantial part of the food served at Lake Nixon had not previously moved in interstate commerce. The Court of Appeals said:

> "With regard to whether a substantial portion of the food which Lake Nixon serves has moved in commerce, the trial court found that food and soft drinks were purchased locally by the Club but noted that the record before the court did not disclose where or how the local suppliers obtained the products. The court further observed that the meat products sold by the defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. It also made an observation that the bread used in the sandwiches was baked and packaged locally but took judicial notice that the principal ingredients going into the bread were produced and processed in other states. This observation on the part of the court, however, was entirely voluntary, and the ingredients in the bread would not constitute a substantial part of the food served. We might add that it is a matter of common knowledge that Borden's of Arkansas, which the record shows supplied the milk, obtains the unprocessed

milk for its local plant from Arkansas dairy farmers." 395 F. 2d, at 124.

Finally, the Court mentions, almost as an afterthought, Lake Nixon's 15 paddle boats leased from an Oklahoma company on a royalty basis. As to these paddle boats the Court of Appeals said: "It is common knowledge that annually thousands of this type boat are manufactured locally in Arkansas, and there is no evidence whatsoever that any of the equipment moved in interstate commerce." 395 F. 2d, at 125.

The Court's opinion also mentions a juke box leased by Lake Nixon from the juke box's local owner. The Court apparently refers to this juke box on the premise that playing music and dancing makes an establishment the kind of place of "entertainment" that is covered by § 201 (b)(3) of the Act.[4] The Court of Appeals pointed out that Senator Magnuson, floor manager of this part of the Act, said that dance studios would be exempt under the Act. 110 Cong. Rec. 7406. Also, Senator Humphrey, a leading proponent of the measure, said:

> "The deletion of the coverage of retail establishments generally is illustrative of the moderate nature of this bill and of its intent to deal only with the problems which urgently require solution." 110 Cong. Rec. 6533.

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[4] "(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

. . . . . .

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;"

An establishment affects commerce within the meaning of this subsection if, according to § 201 (c) the Act, "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce . . . ."

See also *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342.

It seems clear to me that neither the paddle boats nor the locally leased juke box is sufficient to justify a holding that the operation of Lake Nixon affects interstate commerce within the meaning of the Act. While it is the duty of courts to enforce this important Act, we are not called on to hold nor should we hold subject to that Act this country people's recreation center, lying in what may be, so far as we know, a little "sleepy hollow" between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me.[5] I would affirm the judgments of the two courts below.

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[5] In my opinion in *Atlanta Motel* v. *United States*, 379 U. S. 241, 268, which also applies to *Katzenbach* v. *McClung*, 379 U. S. 294, concurring in the Court's decision upholding the application of this Act to an Atlanta, Georgia, motel and a Birmingham, Alabama, restaurant, I said:

"I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws. I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act." 379 U. S., at 275.

UNITED STATES *v.* ESTATE OF GRACE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 574. Argued April 22, 1969.—Decided June 2, 1969.

In 1931 decedent, Joseph Grace, executed a trust instrument providing for payment of income to his wife, Janet, for her life, with payment to her of any part of the principal which a majority of the trustees thought advisable. Mrs. Grace was given power to designate the manner in which the trust estate remaining at her death was to be distributed among decedent and their children. Shortly thereafter Janet Grace, at decedent's request, executed a virtually identical trust instrument naming decedent as life beneficiary, with the trust corpus consisting of the family estate and securities which decedent had transferred to his wife in preceding years. Upon decedent's death in 1950 the Commissioner of Internal Revenue determined that the trusts were "reciprocal" and included the amount of the Janet Grace trust in decedent's gross estate. A deficiency was assessed and paid and this refund suit was filed. The Court of Claims held that the value of the trust was not includible in decedent's estate under § 811 (c)(1)(B) of the Internal Revenue Code of 1939, which provided that certain transferred property in which a decedent retained a life interest was to be included in his gross estate. *Held:* The doctrine of reciprocal trusts, which was formulated in response to attempts to draft instruments which seemingly avoid the literal terms of § 811 (c)(1)(B) while still leaving the decedent the lifetime enjoyment of his property, *Lehman* v. *Commissioner*, 109 F. 2d 99, applies here and the value of decedent's estate must include the value of the Janet Grace trust. Pp. 320–325.

(a) "[T]he taxability of a trust corpus . . . does not hinge on a settlor's motives, but depends upon the nature and operative effect of the trust transfer," and in the reciprocal trust situation inquiries into subjective intent, especially in intrafamily transfers, create obstacles to the proper application of the federal tax laws. P. 323.

(b) The application of the reciprocal trust doctrine does not depend on a finding that each trust was created as consideration for the other, and does not require a tax-avoidance motive, as such standards, relying on subjective factors, are rarely workable under federal estate tax laws. Pp. 323–324.

(c) The application of the doctrine requires that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as if they had created trusts naming themselves as life beneficiaries. P. 324.

(d) Here the trusts are interrelated, as they are substantially identical and were part of a single transaction designed and carried out by the decedent, and the transfers in trust, even though of properties of different character, left each party, to the extent of mutual value, in the same objective economic position as before. P. 325.

183 Ct. Cl. 745, 393 F. 2d 939, reversed and remanded.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Roberts, Harris Weinstein, Harry Baum, Philip R. Miller,* and *Stuart A. Smith.*

William S. Downard argued the cause for respondents. With him on the brief was *Walter J. Rockler.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves the application of § 811 (c)(1)(B) of the Internal Revenue Code of 1939 to a so-called "reciprocal trust" situation.[1] After Joseph P. Grace's

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[1] Section 811 (c)(1)(B) provided that—

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . .

. . . . . .

"(c) . . .

"(1) *General rule.* To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

. . . . . .

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or

death in 1950, the Commissioner of Internal Revenue determined that the value of a trust created by his wife was includible in his gross estate. A deficiency was assessed and paid, and, after denial of a claim for a refund, this refund suit was brought. The Court of Claims, with two judges dissenting, ruled that the value of the trust was not includible in decedent's estate under § 811 (c) (1)(B) and entered judgment for respondent. *Estate of Grace* v. *United States*, 183 Ct. Cl. 745, 393 F. 2d 939 (1968). We granted certiorari because of an alleged conflict between the decision below and certain decisions in the courts of appeals and because of the importance of the issue presented to the administration of the federal estate tax laws. 393 U. S. 975 (1968). We reverse.

I.

Decedent was a very wealthy man at the time of his marriage to the late Janet Grace in 1908. Janet Grace had no wealth or property of her own, but, between 1908 and 1931, decedent transferred to her a large amount of personal and real property, including the family's Long Island estate. Decedent retained effective control over the family's business affairs, including the property transferred to his wife. She took no interest and no part in business affairs and relied upon her husband's judgment. Whenever some formal action was required regarding property in her name, decedent would have the appropriate instrument prepared and she would execute it.

On December 15, 1931, decedent executed a trust instrument, hereinafter called the Joseph Grace trust.

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enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom . . . ."

Section 811 (c)(1)(B) has been recodified as § 2036 of the Internal Revenue Code of 1954, 26 U. S. C. § 2036.

Named as trustees were decedent, his nephew, and a third party. The trustees were directed to pay the income of the trust to Janet Grace during her lifetime, and to pay to her any part of the principal which a majority of the trustees might deem advisable. Janet was given the power to designate, by will or deed, the manner in which the trust estate remaining at her death was to be distributed among decedent and their children. The trust properties included securities and real estate interests.

On December 30, 1931, Janet Grace executed a trust instrument, hereinafter called the Janet Grace trust, which was virtually identical to the Joseph Grace trust. The trust properties included the family estate and corporate securities, all of which had been transferred to her by decedent in preceding years.

The trust instruments were prepared by one of decedent's employees in accordance with a plan devised by decedent to create additional trusts before the advent of a new gift tax expected to be enacted the next year. Decedent selected the properties to be included in each trust. Janet Grace, acting in accordance with this plan, executed her trust instrument at decedent's request.

Janet Grace died in 1937. The Joseph Grace trust terminated at her death. Her estate's federal estate tax return disclosed the Janet Grace trust and reported it as a nontaxable transfer by Janet Grace. The Commissioner asserted that the Janet and Joseph Grace trusts were "reciprocal" and asserted a deficiency to the extent of mutual value. Compromises on unrelated issues resulted in 55% of the smaller of the two trusts, the Janet Grace trust, being included in her gross estate.

Joseph Grace died in 1950. The federal estate tax return disclosed both trusts. The Joseph Grace trust was reported as a nontaxable transfer and the Janet Grace trust was reported as a trust under which decedent

held a limited power of appointment. Neither trust was included in decedent's gross estate.

The Commissioner determined that the Joseph and Janet Grace trusts were "reciprocal" and included the amount of the Janet Grace trust in decedent's gross estate. A deficiency in the amount of $363,500.97, plus interest, was assessed and paid.

II.

Section 811 (c)(1)(B) of the Internal Revenue Code of 1939 provided that certain transferred property in which a decedent retained a life interest was to be included in his gross estate. The general purpose of the statute was to include in a decedent's gross estate transfers that are essentially testamentary—*i. e.*, transfers which leave the transferor a significant interest in or control over the property transferred during his lifetime. See *Commissioner* v. *Estate of Church,* 335 U. S. 632, 643–644 (1949).

The doctrine of reciprocal trusts was formulated in response to attempts to draft instruments which seemingly avoid the literal terms of § 811 (c)(1)(B), while still leaving the decedent the lifetime enjoyment of his property.[2] The doctrine dates from *Lehman* v. *Commissioner,* 109 F. 2d 99 (C. A. 2d Cir.), cert. denied, 310 U. S. 637 (1940). In *Lehman,* decedent and his brother owned equal shares in certain stocks and bonds. Each brother placed his interest in trust for the other's benefit for life, with remainder to the life tenant's issue. Each brother also gave the other the right to withdraw $150,000 of the principal. If the brothers had each reserved the right to withdraw $150,000 from the trust that each had created, the trusts would have been includible in their gross estates as interests of which each

[2] See Colgan & Molloy, Converse Trusts—The Rise And Fall Of A Tax Avoidance Device, 3 Tax L. Rev. 271 (1948).

had made a transfer with a power to revoke. When one of the brothers died, his estate argued that neither trust was includible because the decedent did not have a power over a trust which he had created.

The Second Circuit disagreed. That court ruled that the effect of the transfers was the same as if the decedent had transferred his stock in trust for himself, remainder to his issue, and had reserved the right to withdraw $150,000. The court reasoned:

> "The fact that the trusts were reciprocated or 'crossed' is a trifle, quite lacking in practical or legal significance. . . . The law searches out the reality and is not concerned with the form." 109 F. 2d, at 100.

The court ruled that the decisive point was that each brother caused the other to make a transfer by establishing his own trust.

The doctrine of reciprocal trusts has been applied numerous times since the *Lehman* decision.[3] It received congressional approval in § 6 of the Technical Changes Act of 1949, 63 Stat. 893.[4] The present case is, however, this Court's first examination of the doctrine.

The Court of Claims was divided over the requirements for application of the doctrine to the situation of this case. Relying on some language in *Lehman* and certain other courts of appeals' decisions,[5] the majority held that

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[3] See, *e. g.*, *Glaser* v. *United States*, 306 F. 2d 57 (C. A. 7th Cir. 1962); *Estate of Moreno* v. *Commissioner*, 260 F. 2d 389 (C. A. 8th Cir. 1958); *Hanauer's Estate* v. *Commissioner*, 149 F. 2d 857 (C. A. 2d Cir.), cert. denied, 326 U. S. 770 (1945); *Cole's Estate* v. *Commissioner*, 140 F. 2d 636 (C. A. 8th Cir. 1944).

[4] See S. Rep. No. 831, 81st Cong., 1st Sess., 5–6 (1949); H. R. Rep. No. 920, 81st Cong., 1st Sess., 5 (1949).

[5] See *McLain* v. *Jarecki*, 232 F. 2d 211 (C. A. 7th Cir. 1956); *Newberry's Estate* v. *Commissioner*, 201 F. 2d 874 (C. A. 3d Cir. 1953); *In re Lueder's Estate*, 164 F. 2d 128 (C. A. 3d Cir. 1947).

the crucial factor was whether the decedent had established his trust as consideration for the establishment of the trust of which he was a beneficiary. The court ruled that decedent had not established his trust as a *quid pro quo* for the Janet Grace trust, and that Janet Grace had not established her trust in exchange for the Joseph Grace trust. Rather, the trusts were found to be part of an established pattern of family giving, with neither party desiring to obtain property from the other. Indeed, the court found that Janet Grace had created her trust because decedent requested that she do so. It therefore found the reciprocal trust doctrine inapplicable.

The court recognized that certain cases had established a slightly different test for reciprocity.[6] Those cases inferred consideration from the establishment of two similar trusts at about the same time. The court held that any inference of consideration was rebutted by the evidence in the case, particularly the lack of any evidence of an estate tax avoidance motive on the part of the Graces. In contrast, the dissent felt that the majority's approach placed entirely too much weight on subjective intent. Once it was established that the trusts were interrelated, the dissent felt that the subjective intent of the parties in establishing the trusts should become irrelevant. The relevant factor was whether the trusts created by the settlors placed each other in approximately the same objective economic position as they would have been in if each had created his own trust with himself, rather than the other, as life beneficiary.

We agree with the dissent that the approach of the Court of Claims majority places too much emphasis on the subjective intent of the parties in creating the trusts and for that reason hinders proper application of the federal estate tax laws. It is true that there is language

[6] *E. g., Orvis* v. *Higgins*, 180 F. 2d 537 (C. A. 2d Cir.), cert. denied, 340 U. S. 810 (1950).

in *Lehman* and other cases that would seem to support the majority's approach. It is also true that the results in some of those cases arguably support the decision below.[7] Nevertheless, we think that these cases are not in accord with this Court's prior decisions interpreting related provisions of the federal estate tax laws.

Emphasis on the subjective intent of the parties in creating the trusts, particularly when those parties are members of the same family unit, creates substantial obstacles to the proper application of the federal estate tax laws. As this Court said in *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 705–706 (1949):

> "Any requirement . . . [of] a post-death attempt to probe the settlor's thoughts in regard to the transfer, would partially impair the effectiveness of . . . [section 811 (c)] as an instrument to frustrate estate tax evasions."

We agree that "the taxability of a trust corpus . . . does not hinge on a settlor's motives, but depends on the nature and operative effect of the trust transfer." *Id.,* at 705. See also *Commissioner* v. *Estate of Church, supra.*

We think these observations have particular weight when applied to the reciprocal trust situation. First, inquiries into subjective intent, especially in intrafamily transfers, are particularly perilous. The present case illustrates that it is, practically speaking, impossible to determine after the death of the parties what they had in mind in creating trusts over 30 years earlier. Second, there is a high probability that such a trust arrangement was indeed created for tax-avoidance purposes. And, even if there was no estate-tax-avoidance motive, the settlor in a very real and objective sense did retain an economic interest while purporting to give away his

[7] See cases cited in n. 5, *supra.*

property.[8] Finally, it is unrealistic to assume that the settlors of the trusts, usually members of one family unit, will have created their trusts as a bargained-for exchange for the other trust. "Consideration," in the traditional legal sense, simply does not normally enter into such intrafamily transfers.[9]

For these reasons, we hold that application of the reciprocal trust doctrine is not dependent upon a finding that each trust was created as a *quid pro quo* for the other. Such a "consideration" requirement necessarily involves a difficult inquiry into the subjective intent of the settlors. Nor do we think it necessary to prove the existence of a tax-avoidance motive. As we have said above, standards of this sort, which rely on subjective factors, are rarely workable under the federal estate tax laws. Rather, we hold that application of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries.[10]

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[8] For example, in the present case decedent ostensibly devised the trust plan to avoid an imminent federal gift tax. Instead of establishing trusts for the present benefit of his children, he chose an arrangement under which he and his wife retained present enjoyment of the property and under which the property would pass to their children without imposition of either estate or gift tax.

[9] The present case is probably typical in this regard. Janet Grace created her trust because decedent requested that she do so; it was in no real sense a bargained-for *quid pro quo* for his trust. See also *Hanauer's Estate* v. *Commissioner*, *supra*, n. 3.

[10] We do not mean to say that the existence of "consideration," in the traditional legal sense of a bargained-for exchange, can never be relevant. In certain cases, inquiries into the settlor's reasons for creating the trusts may be helpful in establishing the requisite link between the two trusts. We only hold that a finding of a bargained-for consideration is not necessary to establish reciprocity.

Applying this test to the present case, we think it clear that the value of the Janet Grace trust fund must be included in decedent's estate for federal estate tax purposes. It is undisputed that the two trusts are interrelated. They are substantially identical in terms and were created at approximately the same time. Indeed, they were part of a single transaction designed and carried out by decedent. It is also clear that the transfers in trust left each party, to the extent of mutual value, in the same objective economic position as before. Indeed, it appears, as would be expected in transfers between husband and wife, that the effective position of each party *vis-à-vis* the property did not change at all. It is no answer that the transferred properties were different in character. For purposes of the estate tax, we think that economic value is the only workable criterion. Joseph Grace's estate remained undiminished to the extent of the value of his wife's trust and the value of his estate must accordingly be increased by the value of that trust.

The judgment of the Court of Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

The object of a reciprocal trust, as I understand it, is for each settlor to rid himself of all taxable power over the corpus by exchanging taxable powers with the other settlor. Yet Joseph P. Grace and his wife did not exchange taxable powers. Each retained a sufficient power over the corpus to require the inclusion of the corpus in his or her taxable estate. Each settlor, as one

of the three trustees, reserved the right to alter the trust by paying to the chief beneficiary "any amounts of the principal of the said trust, up to and including the whole thereof, which the said Trustees or a majority of them may at any time or from time to time deem advisable." I have quoted from Janet Grace's trust. But an almost identical provision is in the trust of Joseph P. Grace.

I would conclude from the existence of this reserved power* that the corpus of the Janet Grace trust was includible in her estate for purposes of the estate tax. *Lober* v. *United States,* 346 U. S. 335.

That is to say the use of a reciprocal trust device to aid the avoidance of an estate tax is simply not presented by this case.

I would dismiss the petition as improvidently granted.

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*The relevant provision of the 1939 Internal Revenue Code (§ 811 (d)(2)) is practically identical with the corresponding provision of the 1954 Code (26 U. S. C. § 2038 (a)(2)). Each provides that a decedent's gross estate shall include property—

"To the extent of any interest therein of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . by the decedent alone *or in conjunction with any person,* to alter, amend, or revoke . . . ." (Emphasis supplied.) The provisions of the Joseph and Janet Grace trusts would seem to satisfy that test, for only two out of the three trustees were necessary to alter the trust. See *Helvering* v. *City Bank Co.,* 296 U. S. 85.

Syllabus.

RODRIQUEZ *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 749. Argued March 26, 1969.—Decided June 2, 1969.

Petitioner, allegedly of Mexican descent with a limited knowledge of English, was convicted on several narcotics charges. Immediately after petitioner was sentenced in June 1963, his retained counsel indicated orally that petitioner wished to appeal *in forma pauperis*. The trial judge, who did not advise petitioner of his right of appeal, told petitioner s counsel that all motions had to be in writing and adjourned court. No written motions were filed and petitioner's counsel did not submit a written notice of appeal within the 10-day limit. When petitioner later tried to file such a notice himself, the trial judge ruled that the expiration of the appeal period deprived the court of jurisdiction. Petitioner sought relief in the Court of Appeals, alleging that he told counsel to perfect an appeal but that counsel had failed to do so. That court denied petitioner's motion for lack of jurisdiction and also refused habeas corpus. Petitioner thereafter brought this action for post-conviction relief under 28 U. S. C. § 2255. The District Court denied relief, and the Court of Appeals affirmed, both courts relying on a Ninth Circuit rule requiring a defendant who claims that he has been deprived of his right of appeal to disclose the errors to be claimed on appeal and to show that denial of an appeal had caused prejudice. *Held:*

1. The Ninth Circuit rule is invalid since (1) it makes an indigent defendant (who must prepare his petition under § 2255 without assistance of counsel) face "the danger of conviction because he does not know how to establish his innocence" and (2) it requires the sentencing court to screen out supposedly unmeritorious appeals in summary fashion, a procedure rejected in *Coppedge* v. *United States*, 369 U. S. 438. P. 330.

2. Under the circumstances of this case, including the length of time since petitioner was sentenced, the trial judge's failure to advise him of his right to appeal and failure to inquire into the circumstances surrounding petitioner's attempt to make an *in forma pauperis* motion, no hearing is required and the case is remanded to the District Court, where petitioner should be resentenced so that he may perfect his appeal as prescribed by the applicable rules. Pp. 331–332.

387 F. 2d 117, reversed and remanded.

William Ross Wallace, by appointment of the Court, 393 U. S. 974, argued the cause and filed a brief for petitioner.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Griswold*, *Assistant Attorney General Wilson*, and *Lawrence G. Wallace*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner brought this suit for post-conviction relief under 28 U. S. C. § 2255, alleging that after his conviction on several narcotics charges he had been improperly denied his right to appeal. Petitioner was sentenced to 11 concurrent 20-year terms on June 20, 1963. Immediately after the sentencing, petitioner's retained counsel attempted to make a motion requesting leave for petitioner to proceed *in forma pauperis*. The trial judge cut petitioner's counsel off, saying that all motions had to be in writing. Without making any further inquiry, he adjourned the court. No written motions were ever filed, and petitioner's counsel did not submit a notice of appeal within the 10-day period specified by the applicable rule.[1] On August 7, 1963, after the time had expired, petitioner attempted to file a notice of appeal himself. He declared that an oral notice had been given at trial. The trial judge ruled that the expiration of the appeal period deprived the court of jurisdiction. Petitioner then sought relief in the Court of Appeals for the Ninth Circuit. He alleged that he had told his counsel to perfect an appeal, but that counsel had failed to do so. The Ninth Circuit denied petitioner's motion for lack of jurisdiction, citing *United States* v. *Robinson*, 361 U. S. 220 (1960). It also refused habeas corpus.

[1] Fed. Rule Crim. Proc. 37 (a), now Fed. Rule App. Proc. 4 (b).

This action was commenced on February 15, 1966. Petitioner alleged that he was of Mexican descent and that his knowledge of English was limited. He further contended that his retained counsel had fraudulently deprived him of his right to appeal. He asked that his conviction be set aside and that he be resentenced so that he could properly take an appeal. The District Court for the Northern District of California denied petitioner's application and the Ninth Circuit affirmed. 387 F. 2d 117 (1967). Both courts relied on a Ninth Circuit rule requiring applicants in petitioner's position to disclose what errors they would raise on appeal and to demonstrate that denial of an appeal had caused prejudice. We granted certiorari to resolve a conflict among the circuits about the propriety of such a requirement.[2] 393 U. S. 951 (1968). We reverse.

I.

As this Court has noted before, "[p]resent federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter

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[2] The Ninth Circuit rule originated in two 1964 decisions, *Wilson* v. *United States*, 338 F. 2d 54, and *Miller* v. *United States*, 339 F. 2d 581. Cf. *McGarry* v. *Fogliani*, 370 F. 2d 42 (C. A. 9th Cir. 1966). The First Circuit has adopted an intermediate position; the defendant is not required to show plain reversible error in his application, but the Government may defeat relief by showing that an appeal would be futile. *Desmond* v. *United States*, 333 F. 2d 378 (1964). Both petitioner and the Government attempt to find support in the position of the Tenth Circuit. *Hannigan* v. *United States*, 341 F. 2d 587 (1965). The Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits do not require any showing about the issues to be raised on appeal. *Camp* v. *United States*, 352 F. 2d 800 (C. A. 5th Cir. 1965); *United States* v. *Smith*, 387 F. 2d 268 (C. A. 6th Cir. 1967); *Calland* v. *United States*, 323 F. 2d 405 (C. A. 7th Cir. 1963); *Williams* v. *United States*, 402 F. 2d 548 (C. A. 8th Cir. 1968); *Dillane* v. *United States*, 121 U. S. App. D. C. 354, 350 F. 2d 732 (1965).

of right." *Coppedge* v. *United States,* 369 U. S. 438, 441 (1962). The Ninth Circuit seems to require an applicant under 28 U. S. C. § 2255 to show more than a simple deprivation of this right before relief can be accorded. It also requires him to show some likelihood of success on appeal; if the applicant is unlikely to succeed, the Ninth Circuit would characterize any denial of the right to appeal as a species of harmless error. We cannot subscribe to this approach.

Applicants for relief under § 2255 must, if indigent, prepare their petitions without the assistance of counsel. See *Johnson* v. *Avery,* 393 U. S. 483, 487–488 (1969). Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a summary statement of points to be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial. They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one. Like the approach rejected long ago in *Powell* v. *Alabama,* 287 U. S. 45, 69 (1932), the Ninth Circuit's requirement makes an indigent defendant face "the danger of conviction because he does not know how to establish his innocence." Moreover, the Ninth Circuit rule would require the sentencing court to screen out supposedly unmeritorious appeals in ways this Court rejected in *Coppedge.* Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated.

II.

The Government, while not arguing that the courts below properly denied relief on the pleadings, urges us to remand this case for a truncated factual hearing. Drawing upon this Court's recognition in *Machibroda* v. *United States*, 368 U. S. 487, 495 (1962), that the hearing requirement of § 2255 "does not strip the district courts of all discretion to exercise their common sense," the Government suggests that the District Court be instructed to obtain an affidavit from petitioner's trial attorney explaining why no notice of appeal was filed. This explanation, together with petitioner's allegations, would be used to judge the propriety of a hearing.

This issue was not present in this case when certiorari was granted and we do not think it is present now. For we think it "just under the circumstances," 28 U. S. C. § 2106, for us to dispose of petitioner's arguments finally at this stage. Six years have now elapsed since petitioner was sentenced, and we do not see how further delay and further prolonged proceedings would serve the cause of justice. Moreover, it appears from the trial transcript in this case that the trial judge erroneously failed to advise petitioner of his right to appeal. At the time of trial, Fed. Rule Crim. Proc. 37 (a)(2) required the sentencing judge to inform unrepresented defendants of their right to appeal; the clerk upon request was required to file a notice of appeal for the defendant.[3] Counsel's attempt to

[3] Rule 37 (a)(2) provided:

"When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

This provision has since been transferred to Rule 32 (a)(2). It now applies to defendants going to trial on a plea of not guilty, whether or not they are represented by counsel. The problem of determining whether to give notice to a person represented at trial, but who may not be represented on appeal, will therefore not recur.

obtain leave for petitioner to proceed *in forma pauperis* should have put the trial judge on notice that petitioner would be unrepresented in the future. Moreover, unless an appeal was contemplated, there would be no reason to make such a motion. As the trial judge should have recognized, petitioner was therefore precisely the kind of defendant who needed the protection afforded by the rule. Had he known that the clerk would file a notice of appeal for him, he could easily have avoided the difficulties he has faced. At the very least, the trial judge should have inquired into the circumstances surrounding the attempt to make the *in forma pauperis* motion. His failure to do so effectively deprived petitioner of his right to appeal. Since this deprivation appears on the record before us, we see no need for any factual determinations on remand. Cf. *United States* v. *Smith*, 387 F. 2d 268 (C. A. 6th Cir. 1967).

The judgment is reversed and the case is remanded to the District Court where petitioner should be resentenced so that he may perfect an appeal in the manner prescribed by the applicable rules.

It is so ordered.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I agree with Part I of the Court's opinion, but cannot subscribe to Part II, in which the Court reinstates petitioner's right to appeal without further proceedings below. In taking this course I think the Court has been too insensitive to what, on this record, is due the trial judge, petitioner's trial counsel, and the orderly administration of the criminal process.

In my opinion, this record does not show that petitioner was wrongfully denied an opportunity to appeal. It appears from the record that immediately following petitioner's sentencing his lawyer indicated orally that

petitioner wished to appeal *in forma pauperis*, and that the judge informed the lawyer that "all motions" had to be made in writing. Thereafter no written notice of appeal was filed within the 10-day limit. Petitioner further *alleges* that he told his counsel to perfect an appeal and that counsel neglected to do so, but those allegations have never been tested by the adversary process.

The Court undertakes to justify its decision not to require a hearing and findings on this score by characterizing as "error" the sentencing judge's failure "to advise petitioner of his right to appeal," as then supposedly required by Fed. Rule Crim. Proc. 37 (a)(2), and by concluding that it is "just under the circumstances," 28 U. S. C. § 2106, to dispose of the case at this level. See *ante*, at 331–332.

Although I share the Court's concern that petitioner receive promptly all relief which is legally due him, I am unable to accept either this attribution of "error" to the trial judge or this bypassing of established methods for determining the truth of factual allegations. At the time petitioner was sentenced, Rule 37 (a)(2) required that a sentencing judge advise only "a defendant *not represented by counsel*" of his right to appeal.[1] (Emphasis supplied.) In this instance, petitioner was represented by retained counsel both at trial and at sentencing. The excerpts from the trial transcript upon which the Court relies contain nothing at all to rebut the natural inference, apparently drawn by the sentencing judge, that petitioner's counsel would continue to represent him at least for the purpose of filing a notice of appeal. Indeed,

[1] This provision was subsequently amended to require that the judge so advise all defendants, whether or not represented by counsel. See *ante*, at 331, n. 3. See also *Peoples* v. *United States*, 337 F. 2d 91 (1964); *Calland* v. *United States*, 323 F. 2d 405 (1963); *Boruff* v. *United States*, 310 F. 2d 918 (1962).

petitioner's own statement of the facts reveals that this inference was wholly justified, for petitioner asserts that after his sentencing "his counsel advised both him and his wife that he would arrange for their appeals." [2] Thus, even if it is assumed that "the trial judge should have inquired into the circumstances surrounding the attempt to make the *in forma pauperis* motion," *ante*, at 332, the judge's omission was surely at most harmless error.

I would therefore remand the case to the District Court, so that it may be determined whether petitioner in fact did instruct his attorney to perfect an appeal and whether the attorney in fact neglected to do so. This course seems to me to be required both in the interest of orderly procedure and in fairness to petitioner's trial attorney.

Furthermore, as suggested by the Government, I would permit the District Court discretion to begin by obtaining an affidavit from petitioner's attorney in response to petitioner's allegations. Who knows whether the attorney may not have in his possession documentary evidence conclusively showing the allegations to be unfounded? Or who knows whether the attorney may not wish to concede the accuracy of the allegations? In either case, the affidavit procedure might obviate the necessity for a full-blown hearing. If the attorney has no documentary evidence, and if his affidavit reveals a factual controversy, then of course a hearing would be required. Such a procedure entirely fits the language of 28 U. S. C. § 2255 and this Court's statement in *Machibroda* v. *United States*, 368 U. S. 487, 495 (1962), that § 2255 "does not strip the district courts of all discretion to exercise their common sense."

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[2] Brief for Petitioner 6.

KOWAN *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 1268. Decided June 2, 1969.

Appeal dismissed and certiorari denied.

Gladys Towles Root and *Kirkpatrick W. Dilling* for appellant.

Roger Arnebergh, Philip E. Grey, and *Michael T. Sauer* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

EGLESON *v.* MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 1335. Decided June 2, 1969.

— Mass. —, 244 N. E. 2d 589, appeal dismissed and certiorari denied.

John G. S. Flym for appellant.

Robert H. Quinn, Attorney General of Massachusetts, *John J. Wall,* Assistant Attorney General, *Lawrence P. Cohen,* Deputy Assistant Attorney General, and *Garrett H. Byrne* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

SNIADACH *v.* FAMILY FINANCE CORP. OF BAY VIEW ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 130. Argued April 21, 1969.—Decided June 9, 1969.

Under Wisconsin's garnishment procedure the clerk of the court issues a summons at the request of the creditor's lawyer, and the latter, by serving the garnishee (here the employer) sets in motion the machinery whereby wages (here one-half those due the employee) are frozen. The creditor has 10 days in which to serve the summons and complaint on the debtor after service on the garnishee, although here petitioner was served the same day as the employer. The wages may be unfrozen if the wage earner wins on the merits in the suit on the debt. Petitioner moved that the garnishment proceedings be dismissed for failure to meet the Fourteenth Amendment's procedural due process requirements, but the Wisconsin courts approved the procedure. *Held:* Wisconsin's prejudgment garnishment of wages procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process. Pp. 339–342.

37 Wis. 2d 163, 154 N. W. 2d 259, reversed.

Jack Greenberg argued the cause for petitioner. With him on the brief were *James M. Nabrit III*, *Thomas M. Jacobson*, and *William F. Young, Jr.*

Sheldon D. Frank argued the cause and filed a brief for respondents.

Rhoda H. Karpatkin and *Marvin M. Karpatkin* filed a brief for the Consumers Union of United States, Inc., as *amicus curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents instituted a garnishment action against petitioner as defendant and Miller Harris Instrument Co., her employer, as garnishee. The complaint alleged

a claim of $420 on a promissory note. The garnishee filed its answer stating it had wages of $63.18 under its control earned by petitioner and unpaid, and that it would pay one-half to petitioner as a subsistence allowance [1] and hold the other half subject to the order of the court.

Petitioner moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. The Wisconsin Supreme Court sustained the lower state court in approving the procedure. 37 Wis. 2d 163, 154 N. W. 2d 259. The case is here on a petition for a writ of certiorari. 393 U. S. 1078.

The Wisconsin statute gives a plaintiff 10 days in which to serve the summons and complaint on the defendant after service on the garnishee.[2] In this case petitioner was served the same day as the garnishee. She nonetheless claims that the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the *in rem* seizure of the wages. What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the

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[1] Wis. Stat. § 267.18 (2) (a) provides:

"When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

[2] Wis. Stat. § 267.07 (1).

wages are frozen.[3] They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.

Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey* v. *Mallonee*, 332 U. S. 245, 253–254; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594, 598–600; *Ownbey* v. *Morgan*, 256 U. S. 94, 110–112; *Coffin Bros.* v. *Bennett*, 277 U. S. 29, 31. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable.

The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what philosophy Wisconsin should or should not embrace. See *Green* v. *Frazier*, 253 U. S. 233. We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder* v. *New York*, 371 U. S. 208, 212) within the meaning of procedural due process. See *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether

[3] Wis. Stat. § 267.04 (1).

to appear or default, acquiesce or contest." 339 U. S., at 314. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, see *McKay* v. *McInnes*, 279 U. S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress,[4] § 304 of which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and beyond that was the great drain on family income. As stated by Congressman Reuss: [5]

> "The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."

Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congressman Sullivan, Chairman of

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[4] 82 Stat. 146, Act of May 29, 1968.

[5] 114 Cong. Rec. 1832.

the House Subcommittee on Consumer Affairs who held extensive hearings on this and related problems stated:

> "What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." 114 Cong. Rec. 1832.

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by his attorneys in the garnishment proceedings:

> "The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'payment schedule' which incorporates these additional charges." [6]

Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner [7] is "generally insufficient to support the debtor for any one week." [8]

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-

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[6] Comment, Wage Garnishment in Washington—An Empirical Study, 43 Wash. L. Rev. 743, 753 (1968). And see Comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759.

[7] See n. 1, *supra.*

[8] Comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759, 767.

earning family to the wall.[9] Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

MR. JUSTICE HARLAN, concurring.

Particularly in light of my Brother BLACK's dissent, I think it not amiss for me to make explicit the precise basis on which I join the Court's opinion. The "property" of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing.

The rejoinder which this statement of position has drawn from my Brother BLACK prompts an additional word. His and my divergence in this case rests, I think, upon a basic difference over whether the Due Process Clause of the Fourteenth Amendment limits state action by norms of "fundamental fairness" whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts

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[9] "For a poor man—and whoever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense, in such a process?" Congressman Gonzales, 114 Cong. Rec. 1833. For the impact of garnishment on personal bankruptcies see H. R. Rep. No. 1040, 90th Cong., 1st Sess., 20–21.

which are part of the Anglo-American legal heritage—not, as my Brother BLACK continues to insist, from the mere predilections of individual judges.

From my standpoint, I do not consider that the requirements of "notice" and "hearing" are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. Compare the majority and dissenting opinions in the Wisconsin Supreme Court, 37 Wis. 2d 163, 178, 154 N. W. 2d 259, 267 (1967). Apart from special situations, some of which are referred to in this Court's opinion, see *ante*, at 339, I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. See, *e. g.*, *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153 (1941); *United States* v. *Illinois Cent. R. Co.*, 291 U. S. 457, 463 (1934); *Londoner* v. *City & County of Denver*, 210 U. S. 373, 385–386 (1908).* And I am

*There are other decisions to the effect that one may be deprived of property by summary administrative action taken before hearing when such action is essential to protect a vital governmental interest. See, *e. g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *Fahey* v. *Mallonee*, 332 U. S. 245 (1947); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *North Amer. Cold Storage Co.* v. *City of Chicago*, 211 U. S. 306 (1908). However, no such justification has been advanced in behalf of Wisconsin's garnishment law.

quite unwilling to take the unexplicated *per curiam* in *McKay* v. *McInnes*, 279 U. S. 820 (1929), as vitiating or diluting these essential elements of due process.

MR. JUSTICE BLACK, dissenting.

The Court here holds unconstitutional a Wisconsin statute permitting garnishment before a judgment has been obtained against the principal debtor. The law, however, requires that notice be given to the principal debtor and authorizes him to present all of his legal defenses at the regular hearing and trial of the case. The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, show why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. The Court shows it believes the garnishment policy to be a " 'most inhuman doctrine' "; that it " 'compels the wage earner, trying to keep his family together, to be driven below the poverty level' "; that " 'in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides.' "

The foregoing emotional rhetoric might be very appropriate for Congressmen to make against some phases of garnishment laws. Indeed, the quoted statements were made by Congressmen during a debate over a proposed

federal garnishment law. The arguments would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be. There is not one word in our Federal Constitution or in any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such decisions, I think, should be made by state and federal legislators, and not by this Court.

This brings me to the short concurring opinion of my Brother HARLAN, which makes "explicit the precise basis" on which he joins the Court's opinion. That basis is:

> "The 'property' of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing."

Every argument implicit in this summary statement of my Brother HARLAN's views has been, in my judgment, satisfactorily answered in the opinion of the Supreme Court of Wisconsin in this case—an outstanding opinion

on constitutional law. 37 Wis. 2d 163, 154 N. W. 2d 259. That opinion shows that petitioner was not required to wait until the "culmination of the main suit," that is, the suit between the creditor and the petitioner. In fact the case now before us was not a final determination of the merits of that controversy but was, in accordance with well-established state court procedure, the result of a motion made by the petitioner to dismiss the garnishment proceedings. With reference to my Brother HARLAN's statement that petitioner's deprivation could not be characterized as *de minimis*, it is pertinent to note that the garnishment was served on her and her employer on the same day, November 21, 1966; that she, without waiting for a trial on the merits, filed a motion to dismiss the garnishment on December 23, 1966, which motion was denied by the Circuit Court on April 18, 1967; and that it is that judgment which is before us today. The amount of her wages held up by the garnishment was $31.59. The amount of interest on the wages withheld even if computed at 10% annually would have been about $3. Whether that would be classified as *de minimis* I do not know and in fact it is not material to know for the decision of this case.

In the motion to dismiss, petitioner, according to the Supreme Court of Wisconsin, asserted a "number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced." 37 Wis. 2d 163, 166, 154 N. W. 2d 259, 261. The court went further and pointed out that under Wisconsin law the court would not strike down a law as unconstitutional on the ground that some person other than the challenger of that law might in the future be injured by its unconstitutional part. It would seem, therefore, that the great number of our cases holding that we do not determine the consti-

tutionality of state statutes where the judgment on them was based on state law would prevent our passing on this case at all.

The indebtedness of petitioner was evidenced by a promissory note, but petitioner's affidavit in support of the motion to dismiss, according to the Wisconsin Supreme Court contained no allegation that she is not indebted thereon to the plaintiff. Of course if it had alleged that, or if it had shown in some other way that this was not a good-faith lawsuit against her, the Wisconsin opinion shows that this could have disposed of the whole case on the summary motion.

Another ground of unconstitutionality, according to the state court, was that the Act permitted a defendant to post a bond and secure the release of garnished property and that this provision denied equal protection of the law "to persons of low income." With reference to this ground, the Wisconsin court said:

> "Appellant has made no showing that she is a person of low income and unable to post a bond." 37 Wis. 2d, at 167, 154 N. W. 2d, at 261.

Another ground of unconstitutionality urged was that since many employers discharge garnished employees for being unreliable, the law threatened the gainful employment of many wage earners. This contention the Supreme Court of Wisconsin satisfactorily answered by saying that petitioner had "made no showing that her own employer reacted in this manner."

Another ground challenging the state act was that it affords 10 days' time to a plaintiff to serve the garnishee summons and complaint on the defendant after service of the summons on the garnishee. This, of course, she could not raise. The Wisconsin Supreme Court's answer to this was that petitioner was served on the same day as the garnishee.

The state court then pointed out that the garnishment proceedings did not involve "any final determination of the title to a defendant's property, but merely preserve[d] the status quo thereof pending determination of the principal action." 37 Wis. 2d, at 169, 154 N. W. 2d, at 262. The court then relied on *McInnes* v. *McKay*, 127 Me. 110, 141 A. 699. That suit related to a Maine attachment law which, of course, is governed by the same rule as garnishment law. See "garnishment," Bouvier's Law Dictionary; see also *Pennoyer* v. *Neff*, 95 U. S. 714. The Maine law was subjected to practically the same challenges that Brother HARLAN and the Court raise against this Wisconsin law. About that law the Supreme Court of Maine said:

> "But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 127 Me. 110, 116, 141 A. 699, 702–703.

This Court did not even consider the challenge to the Maine law worthy of a Court opinion but affirmed it in a *per curiam* opinion, 279 U. S. 820, on the authority of two prior decisions of this Court. See also *Standard Oil Co.* v. *Superior Court of New Castle County*, 44 Del.

538, 62 A. 2d 454, appeal dismissed, 336 U. S. 930; *Harris* v. *Balk*, 198 U. S. 215, 222, 227–228.

The Supreme Court of Wisconsin, in upholding the constitutionality of its law also cited the following statement of our Court made in *Rothschild* v. *Knight*, 184 U. S. 334, 341:

> "To what actions the remedy of attachment may be given is for the legislature of a State to determine and its courts to decide . . . ."

Accord, *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193.

The Supreme Court of Wisconsin properly pointed out:

> "The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times." 37 Wis. 2d, at 171, 154 N. W. 2d, at 264.

The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey* v. *Morgan*, 256 U. S. 94, 104, 112."

The *Ownbey* case, which was one of the two cited by this Court in its *per curiam* affirmance of *McInnes* v. *McKay*, *supra*, sustained the constitutionality of a Delaware attachment law. And see *Byrd* v. *Rector*, 112 W. Va. 192, 163 S. E. 845.

I can only conclude that the Court is today overruling a number of its own decisions and abandoning the legal customs and practices in this country with reference to attachments and garnishments wholly on the ground that the garnishment laws of this kind are based on unwise policies of government which might some time in the future do injury to some individuals. In the first sentence of the argument in her brief, petitioner urges that this Wisconsin law "is contrary to public policy"; the Court apparently finds that a sufficient basis for holding it unconstitutional. This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision. See my dissent in *Adamson* v. *California*, 332 U. S. 46, 68.

ADDENDUM.

The latest statement by my Brother HARLAN on the power of this Court under the Due Process Clause to hold laws unconstitutional on the ground of the Justices' view of "fundamental fairness" makes it necessary for me to add a few words in order that the differences between us be made absolutely clear. He now says that the Court's idea of "fundamental fairness" is derived "not alone . . . from the specifics of the Constitution, but also . . . from concepts which are part of the Anglo-American legal heritage." This view is consistent with that expressed by Mr. Justice Frankfurter in *Rochin* v. *California* that due process was to be determined by "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." 342 U. S. 165, 169. In any event, my Brother HARLAN's "Anglo-American legal heritage" is no more definite than the "notions of justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more or less than an implicit adop-

tion of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws are constitutional, are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?

RODRIGUE ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 436. Argued February 25, 1969.—Decided June 9, 1969.

Two men were killed while working on artificial island drilling rigs located on the Continental Shelf more than a marine league from the Louisiana coast. The men's families brought suits for wrongful death in the District Courts (1) under the Death on the High Seas Act ("Seas Act"), which provides an admiralty action for recovery of pecuniary loss for deaths due to wrongful actions or omissions "occurring on the high seas" more than a marine league off the coast, and (2) under Louisiana law (which would have allowed recovery for additional elements of damage) as assertedly made applicable by the Outer Continental Shelf Lands Act ("Lands Act"). In each case the District Court held that the Seas Act provided the exclusive remedy and the Court of Appeals affirmed. *Held:* Petitioners' remedy is under the Lands Act and Louisiana law. Under the Lands Act, federal law, supplemented by the law of the adjacent State not inconsistent with federal law, is to be applied to artificial islands, which Congress clearly intended were to be treated as islands or federal enclaves within a landlocked State and not as vessels subject to admiralty jurisdiction. Pp. 355–366.

391 F. 2d 671 and 395 F. 2d 216, reversed and remanded.

Philip E. Henderson argued the cause for petitioners. With him on the briefs were *A. Deutsche O'Neal* and *George Arceneaux, Jr.*

James E. Diaz argued the cause for respondents. With him on the brief were *W. Ford Reese, Richard C. Baldwin,* and *James E. Blazek.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves two men, Dore and Rodrigue, who met their deaths on artificial island drilling rigs located on the outer Continental Shelf off the Louisiana coast.

Each man's family brought suit for wrongful death in the federal courts both under the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761 *et seq.* (hereinafter "Seas Act"), and under Louisiana law assertedly made applicable by the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* (hereinafter "Lands Act"). Each family's suit was separately heard and decided in the District Courts and in the Court of Appeals below. In both cases the Court of Appeals for the Fifth Circuit, affirming the District Courts, held that the Seas Act was the exclusive remedy for these deaths. Petitioners sought certiorari, claiming that they are entitled to an additional remedy under the state law adopted by the Lands Act.

In the *Dore* case, the decedent was working on a crane mounted on the artificial island and being used to unload a barge. As the crane lifted a load from the barge to place it on the artificial island, the crane collapsed and toppled over onto the barge, killing the worker. His widow and her three children brought a single action in the United States District Court for the Western District of Louisiana, alleging their own and the decedent's residency in Louisiana and the negligence of the firms which manufactured, installed, and serviced the crane. The suit was brought under the "General Maritime Laws, the Death on the High Seas Act, . . . Article 2315 of the [Louisiana Code] and under the other laws of the United States and the State of Louisiana." It claimed $670,000 in damages to the family plaintiffs for loss of their husband and father, including pecuniary and psychic losses. On motion for summary judgment as to all claims but that under the Seas Act, the District Judge determined that the latter was plaintiffs' only remedy, removed the case to the admiralty side of the court, and thus limited the plaintiffs' recovery to pecuniary loss. The state statute would have allowed recov-

ery for additional elements of damage. The District Judge certified the question pursuant to Federal Rule of Civil Procedure 54 (b), and the Court of Appeals for the Fifth Circuit affirmed. 391 F. 2d 671.

In the *Rodrigue* case, the decedent was performing a test on a drill pipe. He was high on the derrick rising above the artificial island, and fell from it to his death on the floor of the structure. His widow and two children brought three actions in the District Court for the Eastern District of Louisiana. One was an admiralty action under the Seas Act; the other two were civil actions respectively against the owner and insurer of the drill rig, and the owner of the stationary platform. The civil actions were brought under the Lands Act and Article 2315 of the Louisiana Revised Civil Code. The trial court consolidated the two civil actions and dismissed the insurer, who had been made a party to one of the civil actions pursuant to the Louisiana direct-action statute, La. Rev. Stat. Ann. § 22:655. No reason was assigned for the dismissal, but the ground urged in the motion was that the accident did not occur within the State of Louisiana, so that Louisiana law did not apply. Consistently with this, the District Judge dismissed the consolidated civil action before trial, on the ground that the Seas Act provided a remedy and that under such circumstances the Lands Act would not make the inconsistent state remedy applicable.[1] The admi-

[1] The District Court dismissed one of the civil causes of action on the ground that unlike the other it did not specifically name the Lands Act, but rested instead directly on Louisiana law. This formal omission was inconsequential because of the District Judge's view that there would be no cause of action even under the Lands Act and Louisiana law together. On remand, it may be that both claims can be construed to assert actions under the Lands Act and Louisiana Law, or that any deficiency in this regard can be cured by amendment of the pleadings. Fed. Rule Civ. Proc. 15.

ralty action proceeded to trial and judgment of $75,000, 266 F. Supp. 1, which is not now before us. On appeal of the dismissal of the civil actions, the Court of Appeals for the Fifth Circuit affirmed the District Court *per curiam,* citing its decision in the *Dore* case almost two months before. 395 F. 2d 216.

Certiorari was granted in both cases, 393 U. S. 932 (1968), and they were argued together here. In light of the principles of traditional admiralty law, the Seas Act, and the Lands Act, we hold that petitioners' remedy is under the Lands Act and Louisiana law. The Lands Act makes it clear that federal law, supplemented by state law of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State. This approach was deliberately taken in lieu of treating the structures as vessels, to which admiralty law supplemented by the law of the jurisdiction of the vessel's owner would apply. *The Hamilton,* 207 U. S. 398 (1907). This was done in part because men working on these islands are closely tied to the adjacent State, to which they often commute and on which their families live, unlike transitory seamen to whom a more generalized admiralty law is appropriate. Since the Seas Act does not apply of its own force under admiralty principles, and since the Lands Act deliberately eschewed the application of admiralty principles to these novel structures, Louisiana law is not ousted by the Seas Act, and under the Lands Act it is made applicable.

I.

The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent

with applicable federal law, is made clear by the language of the Act. Section 3 makes it the "policy of the United States" that the affected areas "appertain to the United States and are subject to its jurisdiction, control, and power of disposition." [2] Section 4 [3] makes the "Constitu-

[2] 67 Stat. 462, as set forth in 43 U. S. C. § 1332:

"(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter."

[3] 67 Stat. 462, as set forth in 43 U. S. C. § 1333:

"§ 1333. Laws and regulations governing lands.

"(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; restriction on State taxation and jurisdiction.

"(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

"(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this subchapter are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

"(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis

tion and laws and civil and political jurisdiction of the United States" apply "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law through the "adoption of State law as the law of the United States." Under § 4, the adjacent State's laws were made "the law of the United States for [the relevant subsoil and seabed] and artificial islands and fixed structures erected thereon," but only to "the extent that they are applicable and not inconsistent with . . . other Federal laws."

It is evident from this that federal law is "exclusive" in its regulation of this area, and that state law is adopted only as surrogate federal law. The Senate Report on the bill referred to the "precise unequivocal language" of "the provision for the adoption of State laws as Federal law," and referred to the applicable body of law as consisting of the Constitution and laws of the United States, the regulations of the Secretary of the Interior, and finally the laws of the adjacent States "adopted as Federal law and made applicable to supplement existing Federal law and regulations." S. Rep. No. 411 of the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 11 (1953).

It was the Senate Committee which first introduced the present provision adopting state law, and in its report explaining the introduction it asserted: "Paragraph (2) adopts State law as Federal law, to be used when Fed-

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for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom."

eral statutes or regulations of the Secretary of the Interior are inapplicable." *Id.*, at 23. This language makes it clear that state law could be used to fill federal voids. And in the conference report, the House managers of the bill noted that laws of adjacent States which are not inconsistent with federal law "are adopted as the laws of the United States for those particular areas." H. R. Conf. Rep. No. 1031, 83d Cong., 1st Sess., 12 (1953).

The principles that federal law should prevail, and that state law should be applied only as federal law and then only when no inconsistent federal law applied, were adopted by a Congress in which full debate had underscored the issue. Senator Cordon, in presenting the Lands Act to the Senate, noted that the problem addressed by the committee had been raised by "the fact that the full development of the estimated values in the shelf area will require the efforts and the physical presence of thousands of workers on fixed structures in the shelf area. Industrial accidents, accidental death, peace, and order" present problems requiring a body of law for their solution. Since "as every Member of the Senate knows, the Federal Code was never designed to be a complete body of law in and of itself," the committee decided that state law would have to be referred to in some instances. 99 Cong. Rec. 6962–6963. As Senator Anderson, a member of the conference committee, put it: "The real point is . . . that the language in section 4 provides that Federal laws and regulations shall be applicable in the area, but that where there is a void, the State law may be applicable . . . ." 99 Cong. Rec. 7164. Senator Cordon noted that this view was "entirely correct" and added that: "These laws, by the terms of the act, are enacted as Federal law."

The opponents of the Act realized full well that state law was being used only to supplement federal law, and

Senator Long introduced an amendment to the Act which would have made "the laws of such State applicable to the newly acquired area, and . . . the officials of such State [the agents empowered] to enforce the laws of the State in the newly acquired area." In arguing for his amendment, Senator Long asserted that "[i]t is even more important that State law should apply on the artificial islands than on natural islands . . . ." But the amendment was rejected. See 99 Cong. Rec. 7232–7236. This legislative history buttresses the Court of Appeals' finding that in view of the inconsistencies between the state law and the Seas Act, the Seas Act remedy would be exclusive if it applied.

II.

However, for federal law to oust adopted state law federal law must first apply. The court below assumed that the Seas Act[4] did apply, since the island was located more than a marine league off the Louisiana coast. But that is not enough to make the Seas Act applicable.[5] The Act redresses only those deaths stemming from wrongful actions or omissions "occurring on the high seas," and these cases involve a series of events on artificial islands. Moreover, the islands were not erected primarily as navigational aids, and the

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[4] 41 Stat. 537, 46 U. S. C. §§ 761–768. 46 U. S. C. § 761 reads: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

[5] Since this topic received scant attention in argument in this Court, additional briefs were requested.

accidents here bore no relation to any such function. Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea.[6] To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure solely or principally as a navigational aid.[7] But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act[8] would now make available the admiralty remedy in any event.

The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers. Indeed, the Court has specifically held that drilling platforms are not within admiralty jurisdiction. *Phoenix Construction Co.* v. *The Steamer Poughkeepsie*, 212 U. S. 558, affirming 162 F. 494 (1908). There a ship damaged a structure "composed of various lengths of wrought iron pipe surrounded by a platform on the surface." Citing the same cases on which the lower court had relied, this Court affirmed its conclusion that jurisdiction was lacking since the "project which the libellant was engaged

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[6] *The Plymouth*, 3 Wall. 20 (1866); *The Troy*, 208 U. S. 321 (1908); *T. Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179 (1928); *Hastings* v. *Mann*, 340 F. 2d 910 (C. A. 4th Cir.), cert. denied, 380 U. S. 963 (1965).

[7] *The Blackheath*, 195 U. S. 361 (1904); *The Raithmoor*, 241 U. S. 166 (1916); *Doullut & Williams Co.* v. *United States*, 268 U. S. 33 (1925).

[8] "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 62 Stat. 496, 46 U. S. C. § 740.

in is not even suggestive of maritime affairs. It was supplying water to a city and the mere fact of the means being carried under the bed of a river, with extensions through the river to the surface, did not create any maritime right, nor was it in any sense an aid to navigation, which was the distinguishing feature of The Blackheath." 162 F., at 496. In these circumstances, the Seas Act—which provides an action in admiralty—clearly would not apply under conventional admiralty principles and, since the Lands Act provides an alternative federal remedy through adopted state law, there is no reason to assume that Congress intended to extend those principles to create an admiralty remedy here. And if the Congress had made the 1920 Seas Act applicable, ousting inconsistent state law, the artificial island worker would be entitled to far less comprehensive remedies in many cases than he is now.

Even if the admiralty law would have applied to the deaths occurring in these cases under traditional principles, the legislative history shows that Congress did not intend that result. First, Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided not to make it apply. The legislative history of the Lands Act makes it clear that these structures were to be treated as islands or as federal enclaves within a landlocked State, not as vessels.

In introducing the bill to the Senate, Senator Cordon explained its inception as follows:

> "The committee first attempted to provide housekeeping law for the outer shelf by applying to the structures necessary for the removal of the minerals in the area under the maritime law of the United States. This was first attempted by incorporating by reference the admiralty statutes. This solution at first seemed to be a reasonably complete answer . . . inasmuch as the drilling platforms would

have been treated as vessels. Maritime law, which applies to American vessels, would have applied under that theory to the structures themselves.

"However, further consideration clearly showed that this approach was not an adequate and complete answer to the problem. The so-called social laws necessary for protection of the workers and their families would not apply. I refer to such things as unemployment laws, industrial-accident laws, fair-labor-standard laws, and so forth. . . .

. . . . . .

"[Ultimately, instead,] the whole body of Federal law [was made applicable] to the area [as well as state law where necessary]. Thus, the legal situation is comparable to that in the areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands." 99 Cong. Rec. 6963.

Similarly, Senator Ellender asserted that in the first draft it "was sought to treat the platforms or artificial islands created in the water as ships" but now the "islands are made subject to our domestic law" instead so as to be "treated just as though they were islands created by nature, insofar as the application of our domestic laws is concerned." 99 Cong. Rec. 7235.

The House bill, H. R. 5134, had made federal law applicable, but also provided that the not "inconsistent . . . laws of each coastal State which so provides shall be applicable," at least if adopted by the Secretary of the Interior. H. R. Rep. No. 413, 83d Cong., 1st Sess., 4, 8–9 (1953). The Senate bill, as it read before committee amendments, provided instead that acts "on any structure (other than a vessel)" located on the Continental Shelf for exploring or exploiting its resources "shall be

deemed to have occurred or been committed aboard a vessel of the United States on the high seas and shall be adjudicated . . . according to the laws relating to such acts . . . on vessels of the United States on the high seas." When the Senate bill was reported from committee, this section had been replaced by the present language, omitting entirely any reference to treating the islands as though they were vessels.

Careful scrutiny of the hearings which were the basis for eliminating from the Lands Act the treatment of artificial islands as vessels convinces us that the motivation for this change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these fixed structures. See generally Hearings before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., on S. 1901 (1953) (hereafter Hearings). One theme running throughout the hearings was the close relationship between the workers on the islands and the adjoining States. Objections were repeatedly voiced to application of maritime law and with it the admiralty principle that the law of the State of the owner of the artificial island "vessel" is used for supplementation.[9] On the other

[9] For example, Senator Daniel asserted that "the fixed platforms out there do not even touch the waters except for the supporting pipes or 'legs' which go through the water down into the ground. I think you can treat those platforms as connected with the soil and development of the soil rather than treating them as vessels." Hearings 22. Similarly, Acting Secretary of the Treasury Rose opined in a letter to the Committee that these islands might not even be considered to be "upon navigable waters" for the purpose of applying laws requiring safety lights. Hearings 53. A specific provision was added to the statute to permit safety regulation. § 4 (e), 43 U. S. C. § 1333 (e). Obviously these islands were not constructed principally as aids to navigation as respondents contend, cf. *Pure Oil Co.* v. *Snipes*, 293 F. 2d 60 (C. A. 5th Cir. 1961), but were instead hazards to navigation requiring warning

hand, federal enforcement of the law in this area was insisted upon by the Department of Justice, and there was substantial doubt whether state law and jurisdiction could or should be extended to the structures.[10] A federal solution was thought necessary.

The committee was aware that it had the power to treat activity on these artificial islands as though it occurred aboard ship. *Jones* v. *United States,* 137 U. S. 202 (1890); Hearings 511–512; Extension of Admiralty Act of 1948, 62 Stat. 496, 46 U. S. C. § 740; see *United States* v. *Matson Nav. Co.,* 201 F. 2d 610 (C. A. 9th Cir. 1953); cf. *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206, 209 (1963). And the very decision to do so in the initial bill recognized that if it were not adopted explicitly, maritime law simply would not apply to these stationary structures not erected as navigational aids.[11] Moreover, the committee was acutely aware of the inaptness of admiralty law. The bill applied the same law to the

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facilities. Governor Kennon of Louisiana voiced strong opposition, Hearings 449–485, as did Senator Long of that State, *e. g.,* Hearings 275–278. See also Hearings 513–518, 545, 612. And at Hearings 644–645, the inappropriateness of applying the law of the owner of the artificial island or subsoil lease, rather than the law of the adjacent State, was given special emphasis.

[10] See letter to Senator Cordon from Assistant Attorney General Rankin, Hearings 700; testimony of Mr. Rankin, Hearings 644–645, 664–665, 652–653.

[11] In the opening discussion of the original draft of the bill, treating these islands as vessels, Senator Cordon remarked: "It is the view of the chairman that when these individuals leave their vessels and board this structure, they are subject to the law that operates on the structure, which in this instance is the same law that operates on board a ship, but becomes that *only because of this act.*" Hearings 9. (Emphasis added.) And at the end of the hearings, when the Senators were questioning an admiralty lawyer on the treatment these structures would receive absent any statutory provision, he informed them that even a lighthouse would be treated as land, except insofar as it was subject to admiralty jurisdiction as an aid to navigation. Hearings 669–670.

seabed and subsoil as well as to the artificial islands, and admiralty law was obviously unsuited to that task.[12]

Although the Assistant Attorney General, Office of Legal Counsel, persisted to the end in his claim that admiralty law should apply, and that with it should be incorporated the law of the State of the island's owner, this view obviously did not prevail. Instead, a compromise emerged. The administration's opposition to committing these areas solely to the jurisdiction of state courts, state substantive law, and state law enforcement was recognized in that the applicable law was made federal law enforceable by federal officials in federal courts. But the special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families was also recognized by dropping the treatment of these structures as "vessels" and instead, over the objections of the administration that these islands were not really located within a State, the bill was amended to treat them "as if [they] were [in] an area of exclusive Federal jurisdiction located within a State." State law became federal law federally enforced.

In view of all this, and the disclosure by Senator Cordon to the Senate upon introduction of the bill that the admiralty or maritime approach of the original bill had been abandoned, it is apparent that the Congress decided that these artificial islands, though surrounded by the

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[12] An admiralty expert questioned by the committee took the position that application of maritime law would be unwise. "Maritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose." Hearings 668. Since the Act treats seabed, subsoil, and artificial islands the same, dropping any reference to special treatment for presumptive vessels, the most sensible interpretation of Congress' reaction to this testimony is that admiralty treatment was eschewed altogether, except to the extent that the Extension of Admiralty Act might make it applicable.

high seas, were not themselves to be considered within maritime jurisdiction. Thus the admiralty action under the Seas Act no more applies to these accidents actually occurring on the islands than it would to accidents occurring in an upland federal enclave or on a natural island to which admiralty jurisdiction had not been specifically extended. At a minimum, the legislative history shows that accidents on these structures, which under maritime principles would be no more under maritime jurisdiction than accidents on a wharf located above navigable waters, were not changed in character by the Lands Act.

Since the inapplicability of the Seas Act removes any obstacle to the application of state law by incorporation as federal law through the Lands Act, the decisions below are reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Syllabus.

RED LION BROADCASTING CO., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 2. Argued April 2–3, 1969.—Decided June 9, 1969.*

The Federal Communications Commission (FCC) has for many years imposed on broadcasters a "fairness doctrine," requiring that public issues be presented by broadcasters and that each side of those issues be given fair coverage. In No. 2, the FCC declared that petitioner Red Lion Broadcasting Co. had failed to meet its obligation under the fairness doctrine when it carried a program which constituted a personal attack on one Cook, and ordered it to send a transcript of the broadcast to Cook and provide reply time, whether or not Cook would pay for it. The Court of Appeals upheld the FCC's position. After the commencement of the *Red Lion* litigation the FCC began a rule-making proceeding to make the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specify its rules relating to political editorials. The rules, as adopted and amended, were held unconstitutional by the Court of Appeals in *RTNDA* (No. 717), as abridging the freedoms of speech and press. *Held:*

1. The history of the fairness doctrine and of related legislation shows that the FCC's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the FCC was implementing congressional policy. Pp. 375–386.

(a) The fairness doctrine began shortly after the Federal Radio Commission was established to allocate frequencies among competing applicants in the public interest, and insofar as there is an affirmative obligation of the broadcaster to see that both sides are presented, the personal attack doctrine and regulations do not differ from the fairness doctrine. Pp. 375–379.

(b) The FCC's statutory mandate to see that broadcasters operate in the public interest and Congress' reaffirmation, in the

*Together with No. 717, *United States et al.* v. *Radio Television News Directors Assn. et al.*, on certiorari to the United States Court of Appeals for the Seventh Circuit, argued April 3, 1969.

1959 amendment to § 315 of the Communications Act, of the FCC's view that the fairness doctrine inhered in the public interest standard, support the conclusion that the doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. Pp. 379–386.

2. The fairness doctrine and its specific manifestations in the personal attack and political editorial rules do not violate the First Amendment. Pp. 386–401.

(a) The First Amendment is relevant to public broadcasting, but it is the right of the viewing and listening public, and not the right of the broadcasters, which is paramount. Pp. 386–390.

(b) The First Amendment does not protect private censorship by broadcasters who are licensed by the Government to use a scarce resource which is denied to others. Pp. 390–392.

(c) The danger that licensees will eliminate coverage of controversial issues as a result of the personal attack and political editorial rules is at best speculative, and, in any event, the FCC has authority to guard against this danger. Pp. 392–395.

(d) There was nothing vague about the FCC's specific ruling in the *Red Lion* case and the regulations at issue in No. 717 could be employed in precisely the same way as the fairness doctrine in *Red Lion*. It is not necessary to decide every aspect of the fairness doctrine to decide these cases. Problems involving more extreme applications or more difficult constitutional questions will be dealt with if and when they arise. Pp. 395–396.

(e) It has not been shown that the scarcity of broadcast frequencies, which impelled governmental regulation, is entirely a thing of the past, as new uses for the frequency spectrum have kept pace with improved technology and more efficient utilization of that spectrum. Pp. 396–400.

No. 2, 127 U. S. App. D. C. 129, 381 F. 2d 908, affirmed; No. 717, 400 F. 2d 1002, reversed and remanded.

Roger Robb argued the cause for petitioners in No. 2. With him on the brief were *H. Donald Kistler* and *Thomas B. Sweeney*. *Solicitor General Griswold* argued the cause for the United States and the Federal Communications Commission, petitioners in No. 717 and respondents in No. 2. With him on the brief were

Assistant Attorney General McLaren, Deputy Solicitor General Springer, Francis X. Beytagh, Jr., Henry Geller, and *Daniel R. Ohlbaum.*

Archibald Cox argued the cause for respondents in No. 717. With him on the brief for respondents Radio Television News Directors Assn. et al. were *W. Theodore Pierson, Harold David Cohen, Vernon C. Kohlhaas,* and *J. Laurent Scharff.* On the brief for respondent National Broadcasting Co., Inc., were *Lawrence J. McKay, Raymond L. Falls, Jr., Corydon B. Dunham, Howard Monderer,* and *Abraham P. Ordover.* On the brief for respondent Columbia Broadcasting System, Inc., were *Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Robert V. Evans,* and *Herbert Wechsler.*

Briefs of *amici curiae* urging reversal in No. 717 and affirmance in No. 2 were filed by *Melvin L. Wulf* and *Eleanor Holmes Norton* for the American Civil Liberties Union, and by *Earle K. Moore* and *William B. Ball* for the Office of Communication of the United Church of Christ et al. *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* filed a brief for the American Federation of Labor & Congress of Industrial Organizations urging reversal in No. 717.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statu-

tory requirement of § 315 of the Communications Act[1] that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion*

[1] Communications Act of 1934, Tit. III, 48 Stat. 1081, as amended, 47 U. S. C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[2] When Cook heard of the broadcast he

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[2] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government

concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit,[3] the

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agencies . . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!'"

[3] The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U.S.C. § 1004 (d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U.S.C. § 312, for failure to comply with the license's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U.S.C. § 312 (a)(2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U.S.C. §§ 307 (a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication

FCC's position was upheld as constitutional and otherwise proper. 127 U. S. App. D. C. 129, 381 F. 2d 908 (1967).

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit, on review of the rule-making proceeding, as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

As they now stand amended, the regulations read as follows:

> "Personal attacks; political editorials.
>
> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the

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which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], above. See, section 315 (a) of the Act, 47 U. S. C. 315 (a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F. R. 10415. The categories listed in [(3)] are the same as those specified in section 315 (a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the

licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion,* and the promulgation of the regulations in *RTNDA,* are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion.*

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[4]

[4] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion

It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.[5] Consequently, the Federal Radio Commission was established

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that the Radio Communications Act of 1912, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States* v. *Zenith Radio Corporation*, 12 F. 2d 614 (D. C. N. D. Ill. 1926). Cf. *Hoover* v. *Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003 (1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request confirmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1–14 (1932).

[5] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual . . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity." [6]

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U. S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1940), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963).

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[6] Radio Act of 1927, § 4, 44 Stat. 1163. See generally Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36 (1929), aff'd, 59 App. D. C. 333, 41 F. 2d 422 (1930); *KFKB Broadcasting Assn.* v. *FRC*, 60 App. D. C. 79, 47 F. 2d 670 (1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through

agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ." 47 U. S. C. § 303 and § 303 (r).[7] The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U. S. C. §§ 307 (a), 309 (a);

[7] As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., 1616 (1930):

"Senator DILL. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

"Commissioner ROBINSON. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator DILL. Has the Commission considered the question of making regulations requiring the stations to do that?

"Commissioner ROBINSON. Oh, no.

"Senator DILL. It would be within the power of the commission, I think, to make regulations on that subject."

renewing them, 47 U. S. C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U. S. C. § 309 (h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception *"from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."* Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute

is entitled to great weight in statutory construction.[8] And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,[9] especially when Congress has refused to alter the administrative construction.[10] Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,[11] but has ratified it with

[8] *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 541 (1962) (opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART). This principle is a venerable one. *Alexander* v. *Alexandria*, 5 Cranch 1 (1809); *United States* v. *Freeman*, 3 How. 556 (1845); *Stockdale* v. *The Insurance Companies*, 20 Wall. 323 (1874).

[9] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199 (1955); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366 (1889); *United States* v. *Burlington & Missouri River R. Co.*, 98 U. S. 334, 341 (1879); *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871); *Surgett* v. *Lapice*, 8 How. 48, 68 (1850).

[10] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956); *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17 (1953); *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932).

[11] An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 78th Cong., 1st Sess. (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong. Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1934); see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H. R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket-vetoed by the Pres-

positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.[12]

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air [13] and

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ident in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H. R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U. S. 8, 13–14 (1950); *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course, superseded by the specific statutory language added in 1959.

[12] "§ 326. Censorship.

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[13] *John P. Crommelin*, 19 P & F Radio Reg. 1392 (1960).

proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine [14] and was altered

[14] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that that provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that: "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F. C. C., at 1251–1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its

sole guidance, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–217 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[15] *Joseph*

[15] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at

Burstyn, Inc. v. *Wilson*, 343 U. S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is

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considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (J. Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); M. Ernst, The First Freedom 125–180 (1946); T. Robinson, Radio Networks and the Federal Government, especially at 75–87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change, Printed for Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce (1968).

incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,[16] as the Court has noted at length before. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broad-

[16] The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in W. Emery, Broadcasting and Government: Responsibilities and Regulations (1961); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

cast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right

of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 361–362 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that

each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.[17] *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U. S. 525 (1959).

[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Obser-

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression

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vations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719 (1964).

[18] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. Mill, On Liberty 32 (R. McCallum ed. 1947).

to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.[19] It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues.

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[19] The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." F. Stanton, Keynote Address, Sigma Delta Chi National Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in W. Wood, Electronic Journalism (1967).

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U. S. C. § 301. Unless renewed, they expire within three years. 47 U. S. C. § 307 (d). The statute mandates the issuance of licenses if the "public convenience, interest, or necessity will be served thereby." 47 U. S. C. § 307 (a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940), the Court noted that

the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943).

D.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that

the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances

in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.[20] Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.[21] "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum [22] and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[23] Among the various uses for radio frequency space, including marine,

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[20] Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U. S. Dept. of Commerce, Electromagnetic Spectrum Utilization—The Silent Crisis (1966); Joint Technical Advisory Committee, Institute of Electrical and Electronics Engineers and Electronic Industries Assn., Report on Radio Spectrum Utilization (1964); Note, The Crisis in Electromagnetic Frequency Spectrum Allocation, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

[21] *Bendix Aviation Corp.* v. *FCC*, 106 U. S. App. D. C. 304, 272 F. 2d 533 (1959), cert. denied, 361 U. S. 965 (1960).

[22] 1968 FCC Annual Report 65–69.

[23] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could say nothing." *Lafayette Radio Electronics Corp.* v. *United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43 (C. A. 9th Cir.), cert. denied, 389 U. S. 844 (1967).

aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.[24] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

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[24] *Kessler* v. *FCC*, 117 U. S. App. D. C. 130, 326 F. 2d 673 (1963).

[25] In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to and those available in the top 100 market areas for television are set forth:

COMMERCIAL

Market Areas	*Channels Allocated*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	40	45	40	44	0	1
Top 50.....	157	163	157	136	0	27
Top 100.....	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	*Channels Reserved*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	7	17	7	16	0	1
Top 50.....	21	79	20	47	1	32
Top 100.....	35	138	34	69	1	69

1968 FCC Annual Report 132–135.

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[26] This does not mean, of course, that every possible wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The

[26] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). In light of this history; the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment; and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.[27]

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and

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[27] The "airwaves [need not] be filled at the earliest possible moment in all circumstances without due regard for these important factors." *Community Broadcasting Co.* v. *FCC*, 107 U. S. App. D. C. 95, 105, 274 F. 2d 753, 763 (1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 343, 359 F. 2d 994, 1009 (1966).

ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

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[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969).

WILLINGHAM, WARDEN, ET AL. *v.* MORGAN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 228. Argued April 22, 1969.—
Decided June 9, 1969.

Respondent, a federal prisoner, brought a tort action in state court against petitioners, the warden and chief medical officer of a federal penitentiary, who then petitioned for removal of the action to the United States District Court under 28 U. S. C. § 1442 (a)(1). That statute allows removal to federal courts of any civil action against a federal officer "for any act under color of [his] office." Petitioners on removal moved for summary judgment, submitting affidavits that their only contacts with respondent had been in the performance of their official duties as warden within the penitentiary confines and at the prison hospital respectively, which respondent did not deny in his responsive affidavit. The District Court denied respondent's motion to remand and granted summary judgment, holding that the official immunity doctrine of *Barr* v. *Mateo*, 360 U. S. 564, barred respondent's recovery of damages. The Court of Appeals, without reaching the immunity issue, found insufficient basis in the record to support the District Court's refusal to remand to the state court, holding that the "color of office" test for removal under § 1442 (a)(1) is "much narrower" than the "official immunity" standard of *Barr* v. *Mateo*, *supra*. *Held:*

1. The right of removal under § 1442 (a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office, and the test for removal under that statute is broader, not narrower, than the test for official immunity. Pp. 404–407.

2. In this civil suit petitioners sufficiently showed that their relationship to respondent derived solely from their official duties against respondent's charge that they were engaged in some kind of "frolic of their own," and petitioners should have the opportunity of presenting their version of the facts to a federal, not a state, court. Pp. 407–410.

383 F. 2d 139, vacated and remanded.

Francis X. Beytagh, Jr., argued the cause for petitioners. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander*, and *Walter H. Fleischer.*

Joseph M. Snee, by appointment of the Court, 393 U. S. 1061, argued the cause and filed a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises some important questions about the power of federal officials to have actions brought against them removed to the federal courts. Petitioners Willingham and Jarvis are, respectively, the warden and chief medical officer at the United States Penitentiary at Leavenworth, Kansas. Respondent Morgan was a prisoner at the penitentiary at the time he filed this suit in the Leavenworth County District Court. He alleged in his complaint that petitioners and other, anonymous, defendants had on numerous occasions inoculated him with "a deleterious foreign substance" and had assaulted, beaten, and tortured him in various ways, to his great injury. He asked for a total of $3,285,000 in damages from petitioners alone, plus other amounts from the unnamed defendants. Petitioners filed a petition for removal of the action to the United States District Court for the District of Kansas, alleging that anything they may have done to respondent "was done and made by them in the course of their duties as officers of the United States of America . . . and under color of such offices . . . ." Petitioners invoked 28 U. S. C. § 1442 (a)(1), which allows removal to the federal courts of any civil action against "[a]ny officer of the United States . . . for any act

under color of such office . . . ." [1] The Federal District Judge denied respondent's motion to remand the case to the state courts and granted summary judgment to petitioners, holding that recovery of damages was barred by the official immunity doctrine of *Barr* v. *Matteo*, 360 U. S. 564 (1959). Thereafter, respondent perfected an appeal to the Court of Appeals for the Tenth Circuit. That court found it unnecessary to decide the immunity question, for it found insufficient basis in the record to support the District Court's refusal to remand the case to the state courts. 383 F. 2d 139 (1967). The District Court was reversed and the case remanded for further proceedings. Upon the Solicitor General's petition, we granted certiorari to consider whether the Court of Appeals decided the removal question erroneously.[2] 393 U. S. 976 (1968). We reverse.

I.

The court below held that the "color of office" test of § 1442 (a)(1) "provides a rather limited basis for removal." 383 F. 2d, at 141. It noted that the record might well have supported a finding that petitioners were protected from a damage suit by the official immunity

[1] 28 U. S. C. § 1442 (a)(1) provides:

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue."

[2] The opinion below was in apparent conflict with at least three other Court of Appeals decisions. *Poss* v. *Lieberman*, 299 F. 2d 358 (C. A. 2d Cir.), cert. denied, 370 U. S. 944 (1962); *North Carolina* v. *Carr*, 386 F. 2d 129 (C. A. 4th Cir. 1967); *Allman* v. *Hanley*, 302 F. 2d 559 (C. A. 5th Cir. 1962).

doctrine. But it held that the test for removal was "much narrower" than the test for official immunity, 383 F. 2d, at 142, and accordingly that petitioners might have to litigate their immunity defense in the state courts. The Government contends that this turns the removal statute on its head. It argues that the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties. On this view, the test for removal should be broader, not narrower, than the test for official immunity. We agree.

The federal officer removal statute has had a long history. See H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 1147–1150 (1953). The first such removal provision was included in an 1815 customs statute. Act of February 4, 1815, § 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under colour" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. Act of March 2, 1833, § 3, 4 Stat. 633. A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases

growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1874); Judicial Code of 1911, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947).

The purpose of all these enactments is not hard to discern. As this Court said nearly 90 years ago in *Tennessee* v. *Davis*, 100 U. S. 257, 263 (1880), the Federal Government

> "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members."

For this very basic reason, the right of removal under § 1442 (a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on a "federal interest in the matter," *Poss* v. *Lieberman*, 299 F. 2d 358, 359 (C. A. 2d Cir.), cert. denied, 370 U. S. 944 (1962), the very basic interest in the enforcement of federal law through federal officials.

Viewed in this context, the ruling of the court below cannot be sustained. The federal officer removal statute is not "narrow" or "limited." *Colorado* v. *Symes*, 286 U. S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise

a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words "under color of . . . office." In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442 (a)(1).

II.

The question remains, however, whether the record in this case will support a finding that respondent's suit grows out of conduct under color of office, and that it is, therefore, removable. Respondent alleged in his motion for remand that petitioners had been acting "on a frolic of their own which had no relevancy to their official duties as employees or officers of the United States." He argued that in these circumstances the case should be remanded to the state courts. The only facts in the record which in any way respond to this allegation appear in petitioners' affidavits in support of their motion for summary judgment.[3] There, petitioner Willingham de-

[3] This material should have appeared in the petition for removal. However, for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits. See 28 U. S. C. § 1653; *Buell* v. *Sears, Roebuck & Co.*, 321 F. 2d 468 (C. A. 10th Cir. 1963); *Firemen's Ins. Co.* v. *Robbins Coal Co.*, 288 F. 2d 349 (C. A. 5th

clares that the only contact he has had with respondent was "inside the walls of the United States Penitentiary, Leavenworth, Kansas, and in performance of [his] official duties as Warden of said institution." Petitioner Jarvis declares, similarly, that his only contact with respondent was at the prison hospital "and only in the performance of [his] duties as Chief Medical Officer and only with regard to medical care and treatment, diagnoses and routine physical examination." Respondent did not deny either of these statements in his responsive affidavit. The question, then, is whether petitioners adequately demonstrated a basis for removal by showing that their only contact with respondent occurred while they were executing their federal duties inside the penitentiary.

The Judicial Code requires defendants who would remove cases to the federal courts to file "a verified petition containing a short and plain statement of the facts" justifying removal. 28 U. S. C. § 1446 (a). Moreover, this Court has noted that "the person seeking the benefit of [the removal provisions] should be candid, specific and positive in explaining his relation to the transaction" which gave rise to the suit. *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, 35 (1926); see *Colorado* v. *Symes, supra,* at 518–521. These requirements must, however, be tailored to fit the facts of each case.

It was settled long ago that the federal officer, in order to secure removal, need not admit that he actually committed the charged offenses. *Maryland* v. *Soper* (*No. 1*), *supra,* at 32–33. Thus, petitioners in this case need not have admitted that they actually injured respondent. They were, therefore, confronted with something of a dilemma. Respondent had filed a "scattergun" complaint, charging numerous wrongs on numerous different

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Cir.), cert. denied, 368 U. S. 875 (1961). See also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 264–265 (Tentative Draft No. 6, 1968).

(and unspecified) dates. If petitioners were to be "candid, specific and positive" in regard to all these allegations, they would have to describe every contact they had ever had with petitioner, as well as all contacts by persons under their supervision. This would hardly have been practical, or even possible, for senior officials like petitioners.

In a civil suit of this nature,[4] we think it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties. Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. *Maryland* v. *Soper* (*No. 1*), *supra*, at 33. "It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." *Ibid.* In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish. Petitioners sufficiently put in issue the questions of official justification and immunity; the validity of their defenses should be determined in the federal courts.

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[4] Were this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts. Cf. *Colorado* v. *Symes*, *supra*; *Maryland* v. *Soper* (*No. 1*), *supra*.

The Court of Appeals, therefore, erred when it held that petitioners had not adequately demonstrated a right to have their case decided in the federal courts. Because of its resolution of the removal issue, the Court of Appeals did not express any opinion on the propriety of the District Court's award of summary judgment. That question has not been briefed or argued in this Court. Accordingly, we think it proper to vacate the judgment and remand the case to the Court of Appeals so that it may consider this and any other questions which remain in the case.

It is so ordered.

MR. JUSTICE BLACK, concurring.

I concur in the judgment of the Court and in the opinion except for one portion which is quoted below in answer to the Government's contention:

> "It argues that the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties. On this view, the test for removal should be broader, not narrower, than the test for official immunity. We agree."

I see no necessity in this case for comparing the breadth of the law authorizing removal of cases from state to federal courts with the test "for official immunity." This case raises no question about official immunity from lawsuits for conduct of a government employee. Moreover, the difference between the breadth of a right to remove and a right to claim immunity is purely conceptual and cannot be measured by any means that I know about.

I would therefore eliminate the above-quoted statement from the Court's opinion.

Syllabus.

JENKINS *v.* McKEITHEN, GOVERNOR OF LOUISIANA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 548. Argued March 25, 1969.—Decided June 9, 1969.

Appellant, a labor union member, filed this suit in the District Court for declaratory and injunctive relief challenging as violative of due process and equal protection the Louisiana statute that creates a body called the Labor-Management Commission of Inquiry for the purpose of investigating and finding facts relating to violations of state or federal criminal laws in the labor-management relations field. The Commission, appointed by the Governor, is to hold public hearings concerning such alleged violations, and its powers include making rules, employing investigators, compelling the attendance of witnesses, and requiring the production of records. The Commission is required to make public findings whether there is probable cause to believe that criminal violations have occurred, to report such findings of probable cause to law enforcement authorities, and to request the Governor to refer matters to the State Attorney General for prosecutive action. There is no provision for submission of findings for the purpose of legislative action. Witnesses have the right to counsel "subject to . . . reasonable limitations" imposed by the Commission, but the right to cross-examine other witnesses is limited, neither a witness nor a private party having the right to call anyone to testify before the Commission at public hearings. Appellant charged that the Commission is an "executive trial agency" "aimed at conducting public trials concerning criminal law violations"; that its function is publicly to condemn; that the appellees (the Governor and six Commissioners) have singled out appellant and members of his union "as a special class of persons for repressive and willfully punitive action," procuring false statements of criminal activities to initiate baseless criminal proceedings against appellant, coercing public officials into prosecuting false criminal charges against him, and intimidating judges considering legal controversies involving him; and that the Commission and those acting in concert with it will continue to take such actions against appellant. Appellees moved to dismiss, alleging that appellant lacked standing to make his constitutional challenge, since he did not claim that he was called or expected to be called to appear before the Commission

or would be "injured" by the operation of the statute, and that the complaint failed to state a cause of action. A three-judge District Court dismissed the complaint, holding that *Hannah* v. *Larche*, 363 U. S. 420, foreclosed relief on the constitutional issue, and that the other allegations of the complaint raised merely potential defenses to assertedly pending criminal charges. *Held:* The judgment is reversed and remanded. Pp. 413–433.

286 F. Supp. 537, reversed and remanded.

MR. JUSTICE MARSHALL, joined by THE CHIEF JUSTICE and MR. JUSTICE BRENNAN, concluded that:

1. Appellant has standing to challenge the statute's constitutionality. Pp. 421–425.

(a) The allegations of the complaint indicate that the Commission and those acting in concert with it have carried out a series of acts designed to injure appellant in several ways, and it is thus clear that appellant has sufficient adversary interest to insure proper presentation of issues facing the court. Pp. 423–424.

(b) Appellant has sufficiently alleged a nexus between the official action challenged and his legally protected interest, since he has claimed that the very purpose of the Commission is to find him and persons like him guilty of violating criminal laws without trial or procedural safeguards, and to publicize those findings, and thus the Commission's alleged actions will substantially affect him. P. 424.

(c) In the circumstances of this case, where appellant claims a concerted attempt to brand him a criminal without trial and has claimed that he has vainly tried to secure prosecution of charges against him, his opportunity to defend criminal prosecution is not sufficient to deprive him of standing to challenge the statute. Pp. 424–425.

2. Appellant has alleged a cause of action which may make declaratory and injunctive relief appropriate and is entitled to go to trial on his allegations concerning the Commission and that its procedures violate the Due Process Clause of the Fourteenth Amendment. Pp. 425–431.

(a) *Hannah* v. *Larche*, *supra*, is reaffirmed. The functions of the Civil Rights Commission, whose procedures were upheld in that case, were primarily investigatory and for legislative and executive purposes, whereas the Commission in this case is limited to criminal law violations, and allegedly exercises a role very much akin to making an official adjudication of criminal culpability,

performing functions that are primarily accusatory and have no legislative purpose. Pp. 425–428.

(b) Due process requires that the Commission here, which allegedly makes actual findings of guilt, afford a person being investigated the right to confront and cross-examine witnesses against him. Pp. 428–429.

(c) The Commission's alleged procedures drastically limiting the right of a person being investigated to present evidence on his own behalf do not comport with due process. P. 429.

(d) The extent to which the Commission's procedures in these and other respects alleged by appellant may violate the Due Process Clause should be decided in the first instance by the District Court in light of the evidence adduced at trial. Pp. 429–430.

3. Whether appellant's allegations that false criminal charges were filed against him involve actions taken under the statute and should thus be taken into account by the District Court in determining the statute's constitutionality or are merely potential defenses, as the District Court held, to assertedly pending criminal charges should be left open for reconsideration on remand. Pp. 431–432.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his dissent in *Hannah* v. *Larche, supra,* at 493–508. P. 432.

MR. JUSTICE BLACK adhered to MR. JUSTICE DOUGLAS' dissent in *Hannah* v. *Larche, supra,* and while concurring in much of the prevailing opinion in this case, concluded that the statute involved here, like the statute involved in *Hannah,* constitutes a scheme for a nonjudicial tribunal to convict people without any of the safeguards of the Bill of Rights and denies due process of law. Pp. 432–433.

J. Minos Simon argued the cause and filed a brief for appellant.

Ashton L. Stewart, Special Assistant Attorney General of Louisiana, argued the cause for appellees. With him on the brief was *Jack P. F. Gremillion,* Attorney General.

MR. JUSTICE MARSHALL announced the judgment of the Court and delivered an opinion in which MR. CHIEF JUSTICE WARREN and MR. JUSTICE BRENNAN join.

This case involves the constitutionality of a 1967 Louisiana statute, known as Act No. 2, which creates

a body called the Labor-Management Commission of Inquiry. La. Rev. Stat. Ann. §§ 23:880.1–23:880.18 (Supp. 1969). The stated purpose of this Commission is "the investigation and findings of facts relating to violations or possible violations of criminal laws of the state of Louisiana or of the United States arising out of or in connection with matters in the field of labor-management relations . . . ." Act No. 2, Preamble, [1967 Extra. Sess.] La. Acts 3. Appellant, a member of a labor union, filed this suit in the District Court for the Eastern District of Louisiana challenging the constitutionality of Act No. 2 and of certain actions taken by state officials in the administration of the Act and otherwise. He sought both declaratory and injunctive relief. A three-judge court was convened and that court ultimately granted appellees' motion to dismiss the complaint. *Jenkins* v. *McKeithen,* 286 F. Supp. 537 (D. C. E. D. La. 1968). We noted probable jurisdiction of an appeal brought under 28 U. S. C. § 1253.[1] We reverse.

Since the case was decided on a motion to dismiss, a rather detailed examination of the structure of the Act and of the allegations of the complaint is necessary.

I.

The impetus for the formation of the Commission was stated in the preamble of the Act. [1967 Extra. Sess.] La. Acts 2. It cited "unprecedented conditions" in the labor relations of the construction industry, and it particularly noted certain "allegations and accusations of violations of the state and federal criminal laws which should be thoroughly investigated in the public interest . . . ." *Id.,* at 3. The additional investigative facilities of the Commission were thought necessary to

[1] The constitutionality of the Act was upheld in *Martone* v. *Morgan,* 251 La. 993, 207 So. 2d 770, appeal dismissed, 393 U. S. 12 (1968) (petition for rehearing pending).

"supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies . . . ." *Ibid.*

The Commission is composed of nine members appointed by the Governor. La. Rev. Stat. Ann. § 23:880.1 (Supp. 1969). It is empowered to act only upon referral by the Governor when, in his opinion, there is substantial indication that there are or may be "widespread or continuing violations of existing criminal laws" affecting labor-management relations. La. Rev. Stat. Ann. § 23:880.5 (Supp. 1969). Upon referral by the Governor, the Commission is to proceed by public hearing to ascertain the facts pertaining to the alleged violations. La. Rev. Stat. Ann. § 23:880.6 (Supp. 1969). In order to carry out this function, the Commission has the power to make appropriate rules and regulations, to employ attorneys, investigators, and other staff members, to compel the attendance of witnesses, to examine them under oath, and to require the production of books, records, and other evidence. La. Rev. Stat. Ann. § 23:880.8 (Supp. 1969). It can enforce its orders by petition to the state courts for contempt proceedings. La. Rev. Stat. Ann. § 23:880.9 (Supp. 1969).

The scope of the Commission's investigative authority is explicitly limited by the Act to violations of criminal laws. "The commission shall have no power, authority or jurisdiction to investigate, hold hearings or seek to ascertain the facts or make any reports or recommendations on any of the strictly civil aspects of any labor problem . . . ." La. Rev. Stat. Ann. § 23:880.6 B (Supp. 1969).[2] Further, the Commission has no power to

[2] "[I]ts power, authority or jurisdiction shall in no case extend to (1) any matter which is solely an 'unfair labor practice' or an 'unfair employment practice' or a legitimate labor dispute under the provisions of any federal or state law; or (2) any matter which relates to legitimate economic issues arising between labor and

participate in any manner in any civil proceeding, except, of course, contempt proceedings. *Ibid.* The limitation of the Commission to criminal matters is further reinforced by the provision of the Act allowing the Commission, at the request of the Governor, to assign its investigatory forces to the state police to assist the latter in their investigatory activities. La. Rev. Stat. Ann. § 23:880.6 C (Supp. 1969).

The Commission is required to determine, in public findings, whether there is probable cause to believe violations of the criminal laws have occurred. La. Rev. Stat. Ann. § 23:880.7 A (Supp. 1969). Its power is limited to making these findings and recommendations:

> "The commission shall have no authority to and it shall make no binding adjudication with respect to such violation or violations; however, it may, in its discretion, include in its findings the conclusions

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management or the manner in which such labor practices or economic issues are to be settled between the parties, whether by negotiation, arbitration, lockout or strike; or (3) any matter which relates solely to the internal affairs of labor organizations, including but not necessarily restricted to membership policies, election procedures, membership rights and like matters; or (4) any alleged acts of violence or threats of violence or so-called 'mass picketing,' or like conduct by either an employer or a union, which is not related to bribery or extortion, as defined by law, but which is related only to an organizational objective of a labor union or which is related only to furthering the interests of one side or the other in a 'labor dispute,' as that term is defined by federal or state law, such conduct being already regulated by and subject to the police power of the state, exercised through such agencies as the Division of State Police; or (5) any matter which relates solely to the internal affairs of any business organization, including but not necessarily restricted to its labor and business policy and general operations, or (6) any matters which constitute a combination of any two or more of these." La. Rev. Stat. Ann. § 23:880.6 B (Supp. 1969).

> of the commission as to specific individuals . . . and it may make such recommendations for action to the governor as it deems appropriate." *Ibid.*

The findings are to be a matter of public record, La. Rev. Stat. Ann. § 23:880.15 B (Supp. 1969), although they may not be used as prima facie or presumptive evidence of guilt or innocence in any court of law, La. Rev. Stat. Ann. § 23:880.7 A (Supp. 1969). The Commission is required to report its findings to the proper state or federal authorities if it finds there is probable cause to believe that violations of the criminal laws have occurred, and it may file appropriate charges. La. Rev. Stat. Ann. § 23:880.7 B (Supp. 1969). Finally, the Commission may request the Governor to refer matters to the State Attorney General asking the latter to exercise his authority to cause criminal prosecutions to be instituted. La. Rev. Stat. Ann. § 23:880.7 D (Supp. 1969). Nothing in the Act makes any provision for preparation of findings or reports for submission to the Governor or the legislature for the explicit purpose of legislative action. Indeed, the preamble of the Act and the Act itself make it clear that the purpose of the Commission is to supplement the activities of the State's law enforcement agencies in one narrowly defined area.

As indicated above, the Commission has the power to compel the attendance of witnesses. A witness is given notice of the general subject matter of the investigation before being asked to appear and testify. La. Rev. Stat. Ann. § 23:880.10 A (Supp. 1969). A witness has the right to the presence and advice of counsel, "subject to such reasonable limitations as the commission may impose in order to prevent obstruction of or interference with the orderly conduct of the hearing." La. Rev. Stat. Ann. § 23:880.10 B (Supp. 1969). Counsel may question his client as to any relevant matters, *ibid.*, but the

right of a witness or his counsel to examine other witnesses is limited:

> "In no event shall counsel for any witness have any right to examine or cross-examine any other witness but he may submit to the commission proposed questions to be asked of any other witness appearing before the commission, and the commission shall ask the witness such of the questions as it deems to be appropriate to its inquiry." *Ibid.*

With one limited exception to be discussed below, neither a witness nor any other private party has the right to call anyone to testify before the Commission.

Although the Commission must base its findings and reports only on evidence and testimony given at public hearings, the Act does provide for executive session when it appears that the testimony to be given "may tend to degrade, defame or incriminate any person." La. Rev. Stat. Ann. § 23:880.12 A (Supp. 1969). In executive session the Commission must allow the person who might be degraded, defamed, or incriminated an opportunity to appear and be heard, and to call a reasonable number of witnesses on his behalf. *Ibid.* However, the Commission may decide that the evidence or testimony shall be heard in a public hearing, regardless of its effect on any particular person. *Ibid.* In that case, the person affected has the right to appear as a "voluntary witness" and may submit "pertinent" statements of others. *Ibid.* He may submit a list of additional witnesses, but subpoenas will be issued only in the discretion of the Commission. *Ibid.;* see also La. Rev. Stat. Ann. § 23:880.12 C (Supp. 1969).

II.

Appellant's complaint named as defendants the Governor of Louisiana and six members of the Commission. The complaint presented, *inter alia,* the question of

whether the provisions of Act No. 2 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Appellant alleged that the Commission was an executive trial agency "aimed at conducting public trials concerning criminal law violations," and that its function was publicly to condemn. Appellant asserted that the defendants

> "in connection with the administration of the provisions of said Act, have singled out complainant and members of Teamsters Local No. 5 as a special class of persons for repressive and willfully punitive action . . . in furtherance of which a deliberate effort has been made and continues to be made by said officials . . . to destroy the current power structure of the labor union aforesaid . . . ."

More specifically, the complaint alleged that appellees and their agents, acting under color of law and in conspiracy, procured false statements of criminal activities and used such statements to initiate baseless criminal proceedings against appellant, that they intimidated and coerced public officials into filing and prosecuting false criminal charges against appellant, and that they knowingly, willfully, and purposefully intimidated state court judges having under consideration legal controversies involving appellant. These acts of appellees allegedly deprived appellant and all others similarly situated of "rights, privileges and immunities secured to them by the Constitution and laws of the United States." Finally, appellant alleged that the appellees intended to continue to deprive him and others of their rights and that there was no "plain, adequate or efficient remedy at law."

Appellant prayed that a three-judge district court be convened, that a temporary restraining order issue, that Act No. 2 be declared unconstitutional, that all civil

and criminal actions against appellant be permanently restrained, and that other unspecified relief be granted.

Temporary relief was denied by the District Court and a three-judge court was impanelled to hear the case. Appellees answered and moved to dismiss. They alleged that appellant lacked standing to question the constitutionality of Act No. 2 and that the complaint failed to state a cause of action. Thereafter, appellant filed a "Supplemental and Amending Petition" in which he alleged, in some detail, that appellees had continued the course of action described in the original complaint. After a hearing, the court dismissed the complaint. *Jenkins* v. *McKeithen, supra.*

The court, relying largely on the opinion of the Louisiana Supreme Court in *Martone* v. *Morgan,* 251 La. 993, 207 So. 2d 770, appeal dismissed, 393 U. S. 12 (1968) (petition for rehearing pending), held that this Court's decision in *Hannah* v. *Larche,* 363 U. S. 420 (1960), was dispositive of the issue of the constitutionality of the Act. The court further ruled that appellant had not stated any other claim for relief under §§ 1981, 1983, and 1988 of Title 42, United States Code. Rather, the court held that the other matters sought to be raised in the complaint were merely potential defenses to the pending criminal charges and that appellant had not alleged any basis for restraining prosecution of those charges. Finally, the court ruled that appellant's suit was not a proper class action under Rule 23 of the Federal Rules of Civil Procedure.[3] The court did not explicitly rule on the issue of whether appellant lacked standing to challenge the Act.

Appellant presents two questions for review in this Court: Whether Act No. 2 is constitutional and whether

[3] Appellant does not assign this ruling as error on this appeal.

the complaint otherwise states a cause of action under 42 U. S. C. §§ 1981, 1983, and 1988.

III.

We are met at the outset with appellees' assertion that appellant lacks standing to attack the constitutionality of Act No. 2. This argument is based in part upon certain allegations in the complaint that Act No. 2 is unconstitutional because it denies to "a person compelled to appear before . . . [the] Commission" the right to effective assistance of counsel, the right of confrontation, and the right to compulsory process for the attendance of witnesses. Since appellant did not allege in his complaint that he was called to appear before the Commission or that he expected to be called, appellees assert that he lacks standing to assert the denial of rights to those who do appear. See, *e. g., Tileston* v. *Ullman,* 318 U. S. 44 (1943). Further, appellees argue that appellant lacks standing because he cannot demonstrate that he has been, or will be, "injured" by the operation of the challenged statute. We cannot agree.

The present case was decided on appellees' motion to dismiss, in which appellees contested appellant's standing to challenge the constitutionality of the Act. As noted above, the court below made no explicit reference to the issue of standing. But since the question of standing goes to this Court's jurisdiction, see *Flast* v. *Cohen,* 392 U. S. 83, 94–101 (1968), we must decide the issue even though the court below passed over it without comment. Cf. *Tileston* v. *Ullman, supra.*

For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. See, *e. g., Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172, 174–175 (1965). And, the complaint is to be liberally construed in favor of plaintiff. See Fed. Rule Civ. Proc. 8 (f); *Conley* v.

Gibson, 355 U. S. 41 (1957). The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, *supra*, at 45–46. With these rules in mind, we turn to an examination of the allegations of appellant's complaint.

It is true, as appellees assert, that appellant alleges deprivations of rights of those who are or will be called to testify before the Commission and that he fails to allege that he was or will be called to testify. If this were the extent of appellant's allegations, we would agree that appellant lacks standing to challenge the Act. However, appellant's allegations are not limited to those mentioned by appellees. Appellant alleged that the Commission was an "executive trial agency" whose function was to conduct public trials designed to find appellant and others guilty of violations of criminal laws, allegedly for the purpose of injuring him and destroying the labor union of which he was a member. More specifically, appellant alleged that

> "said Commission of Inquiry exercises (a) an accusatory function, (b) its duty to find that named individuals are responsible for criminal law violations, (c) it must advertise such findings, and (d) its findings serve as part of the process of criminal prosecution . . . ."

Finally, the complaint alleged that the appellees, acting in concert with others and in connection with the administration of the Act, have actually engaged in a course of conduct designed publicly to brand appellant and others as criminals, including, as noted above, the filing of allegedly baseless criminal charges against appellant.

Thus, although the complaint is inartfully drawn, it does allege that the Commission and those acting in concert with it have taken and will take in the future certain

actions with respect to appellant. The issue is thus whether those allegations are sufficient to give appellant standing to challenge the constitutionality of the Act creating the Commission and the actions taken by the Commission under authority of that Act. We think that they are.

The concept of standing to sue, as we noted in *Flast* v. *Cohen, supra,* "is surrounded by the same complexities and vagaries that inhere in [the concept of] justiciability" in general. 392 U. S., at 98. Nevertheless, the outlines of the concept can be stated with some certainty. The indispensable requirement is, of course, that the party seeking relief allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . ." *Baker* v. *Carr,* 369 U. S. 186, 204 (1962); see *Flast* v. *Cohen, supra; Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 151 (1951) (concurring opinion). In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast* v. *Cohen, supra,* at 99–100. The decisions of this Court have also made it clear that something more than an "adversary interest" is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast* v. *Cohen, supra,* at 101–106.

In the present case, it is clear that appellant possesses sufficient adversary interest to insure proper presentation of issues facing the court. His allegations, if taken as true, indicate that the Commission and those acting in concert with it have carried out a series of public acts designed to injure him in various ways. Appellant's interest in his own reputation and in his economic well-

being guarantee that the present proceeding will be an adversary one.

We also think that appellant has alleged that the Act's administration was the direct cause of sufficient injury to his own legally protected interests to accord him standing to challenge the validity of the Act. We are not presented with a case in which any injury to appellant is merely a collateral consequence of the actions of an investigative body. See *Hannah* v. *Larche, supra,* at 443; cf. *Sinclair* v. *United States,* 279 U. S. 263, 295 (1929); *McGrain* v. *Daugherty,* 273 U. S. 135, 179–180 (1927). Rather, it is alleged that the very purpose of the Commission is to find persons guilty of violating criminal laws without trial or procedural safeguards, and to publicize those findings. Moreover, we think that the personal and economic consequences alleged to flow from such actions are sufficient to meet the requirement that appellant prove a legally redressable injury. Those consequences would certainly be actionable if caused by a private party and thus should be sufficient to accord appellant standing. See *Greene* v. *McElroy,* 360 U. S. 474, 493, n. 22 (1959); *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 140–141 (opinion of Burton, J.); *id.,* at 151–160 (Frankfurter, J., concurring). It is no answer that the Commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him. See, *e. g., Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407 (1942); cf. *NAACP* v. *Alabama,* 357 U. S. 449, 460–463 (1958). Finally, in the circumstances of the present case, we do not regard appellant's opportunity to defend any criminal prosecutions as sufficient to deprive him of standing to challenge the Act. Cf. *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299 (1927). Appellant's allegations go beyond the normal publicity attend-

ing criminal prosecution; he alleges a concerted attempt publicly to brand him a criminal without a trial. Further, he alleges that he has been unsuccessful in his attempts to secure prosecution of the charges against him.

We hold that appellant's complaint contains sufficient allegations of direct and substantial injury to his own legally protected interests to accord him standing to challenge the constitutionality of Act No. 2.

IV.

We thus reach the merits of appellant's contention that Act No. 2 is unconstitutional. Appellant's complaint is long and inartfully drawn; it contains many allegations of wrongdoing on the part of the Commission and other state officials. But the only issue presented by this aspect of the case is whether the Act creating the Commission is constitutional, either on its face or as applied. Many of appellant's allegations are relevant to this latter contention, but many involve issues that the court below ruled were properly matters to be raised in defense of any criminal prosecutions which might take place. We will deal with those allegations in the final section of this opinion.

Appellees, like the court below, rely heavily on this Court's decision in *Hannah* v. *Larche, supra.* In *Hannah,* this Court upheld the Civil Rights Commission against challenges similar to those involved in the present case. Indeed, Act No. 2 was drafted with *Hannah* in mind and the structure and powers of the Commission here are similar to those of the Civil Rights Commission. See *Jenkins* v. *McKeithen,* 286 F. Supp., at 540; *Martone* v. *Morgan, supra.* We cannot agree, however, that *Hannah* controls the present case, for we think that there are crucial differences between the issues presented by this complaint and the issues in *Hannah.*

The appellants in *Hannah* were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about nondisclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that

> "'[d]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." 363 U. S., at 442.

In rejecting appellants' challenge to the Civil Rights Commission's procedures, the Court placed great emphasis on the investigatory function of the Commission:

> "[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." 363 U. S., at 441.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and "not . . . the result of any affirmative determinations made by the Commission . . . ." 363 U. S., at 443. *Morgan* v. *United States*, 304 U. S. 1 (1938), *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* and *Greene* v. *McElroy, supra,* were distinguished on the ground that "[t]hose cases . . . involved . . . determinations in the nature of adjudications affecting legal rights." 363 U. S., at 451.

We reaffirm the decision in *Hannah.* In our view, however, the Commission in the present case differs in a substantial respect from the Civil Rights Commission and the other examples cited by the Court in *Hannah.* It is true, as the Supreme Court of Louisiana has held, *Martone* v. *Morgan, supra,* that the Commission does not adjudicate in the sense that a court does, nor does the Commission conduct, strictly speaking, a criminal proceeding. Nevertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability. See *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.*

The Commission is limited to criminal law violations; the Act explicitly provides that the Commission shall have no jurisdiction over civil matters in the labor-management relations field. Indeed, the Commision is even limited to certain types of criminal activities.[4] As noted above, nothing in the Act indicates that the Commission's findings are to be used for legislative purposes. Rather, everything in the Act points to the fact that it is concerned only with exposing violations of criminal laws by specific individuals. In short, the Commission very

[4] See n. 2, *supra.*

clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public.

Given this view of the purpose of the Labor-Management Commission of Inquiry, we agree with Justice Frankfurter, concurring in the result in *Hannah* v. *Larche:*

> "Were the [Civil Rights] Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides." 363 U. S., at 488.

When viewed from this perspective, it is clear the procedures of the Commission do not meet the minimal requirements made obligatory on the States by the Due Process Clause of the Fourteenth Amendment. Specifically, the Act severely limits the right of a person being investigated to confront and cross-examine the witnesses against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination is further limited to those questions which the Commission "deems to be appropriate to its inquiry," and those questions must be submitted, presumably beforehand, in writing to the Commission. We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process. See, *e. g., Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 103–104 (1963); *Greene*

v. *McElroy, supra,* at 496–499, and cases cited. In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights. Cf. *Pointer* v. *Texas,* 380 U. S. 400 (1965).

The Commission's procedures also drastically limit the right of a person investigated to present evidence on his own behalf. It is true that he may appear and call a "reasonable number of witnesses" in executive session, but should the Commission decide to hold a public hearing, he is limited to presentation of his own testimony and the "pertinent" written statements of others. The right to present oral testimony from other witnesses and the power to compel attendance of those witnesses may be denied in the discretion of the Commission. The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. See, *e. g., Morgan* v. *United States, supra,* at 18; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 368–369 (1936). And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime. Cf. *Washington* v. *Texas,* 388 U. S. 14 (1967); *In re Oliver,* 333 U. S. 257, 273 (1948). We do not mean to say that the Commission may not impose reasonable restrictions on the number of witnesses and on the substance of their testimony; we only hold that a person's right to present his case should not be left to the unfettered discretion of the Commission.

Appellant argues that the procedures contemplated by the Act are deficient in other respects. In particular, he alleges that the Act provides no meaningful rules of

evidence and fails to provide standards of guilt or innocence. He also alleges that the Act deprives him of effective assistance of counsel. We have, however, said enough to demonstrate that appellant has alleged a cause of action for declaratory and injunctive relief. Whether the Due Process Clause requires that the Commission provide all the procedural protections afforded a defendant in a criminal prosecution, or whether something less is sufficient, are questions that we think should be initially answered by the District Court on remand. As we have noted, "[w]hether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors." *Hannah* v. *Larche, supra,* at 442. We think it inappropriate to rule on the extent to which the Commission's procedures may run afoul of the Due Process Clause on the basis of the record before us, barren as it is of any established facts. That issue is best decided in the first instance by the District Court in light of the evidence adduced at trial.

We do not mean to say that this same analysis applies to every body which has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees alleged by appellant to be applicable to the Commission. As this Court noted in *Hannah,* "the grand jury merely investigates and reports. It does not try." 363 U. S., at 449. Moreover, "[t]he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Id.,* at 489–490 (Frankfurter, J., concurring in the result). Finally the grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court. See *Stirone* v. *United States,* 361 U. S. 212, 218 (1960); *Ex parte Bain,* 121 U. S. 1, 11 (1887); *Hannah* v. *Larche, supra,* at 497–499 (dissenting opinion). Investigative bodies such as the Commission have no claim to specific

constitutional sanction. In addition, the alleged function of the Commission is to make specific findings of guilt, not merely to investigate and recommend. Finally, it is clear from the Act and from the allegations of the complaint that the Commission is in no sense an "independent" body of citizens. Rather, its members serve at the pleasure of the Governor, La. Rev. Stat. Ann. § 23:880.1 (Supp. 1969), and it cannot act in the absence of a "referral" from the Governor, La. Rev. Stat. Ann. §§ 23:880.5, 23:880.6 A (Supp. 1969).

We also wish to emphasize that we do not hold that appellant is now entitled to declaratory or injunctive relief. We only hold that he has alleged a cause of action which may make such relief appropriate. It still remains for him to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process.

V.

As noted above, appellant also alleges in his complaint that appellees, and those acting in concert with them, have engaged in a course of conduct, both pursuant to the Act and otherwise, that has resulted in the filing of false criminal charges against appellant. He alleges numerous other related actions allegedly depriving him of his rights secured by the Constitution. The complaint seeks declaratory and injunctive relief with regard to these acts; in particular, appellant prays that the District Court enjoin all civil and criminal actions pending or to be instituted against him. To the extent that these allegations involve actions taken under the direct authority of Act No. 2, we think that they may properly be considered by the District Court in determining the constitutionality of the Act. However, the District Court characterized many of appellant's allegations as

involving merely potential defenses to the criminal charges assertedly pending. In the exercise of its discretion and because the issues were "intertwined" with the issue of the constitutionality of the Act, the court passed upon the question of whether appellant had alleged a cause of action for declaratory and injunctive relief. Relying in part on its determination that the Act was constitutional, the court held that appellant had not stated a claim for declaratory or injunctive relief and that appellant's remedy was to defend any criminal prosecutions then pending or that might be brought. *Jenkins* v. *McKeithen, supra,* 286 F. Supp., at 542–543. Whether the court will take the same view of the propriety of passing on the question or of the merits in light of our holding and the evidence adduced at trial cannot be determined at this time. Accordingly, we think that issue should be left open for reconsideration on remand.

The judgment of the court below is reversed and the cause is remanded for further proceedings.

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his dissenting opinion in *Hannah* v. *Larche,* 363 U. S. 420, 493–508 (1960).

MR. JUSTICE BLACK, concurring.

I concur in the Court's judgment and in much of what is said in the prevailing opinion. I cannot agree, however, to reaffirming *Hannah* v. *Larche,* 363 U. S. 420. I joined the dissent of MR. JUSTICE DOUGLAS in the *Hannah* case and still adhere to that dissent. The Louisiana law here, like the federal law considered in the *Hannah* case, is, in my judgment, nothing more nor less than a scheme for a nonjudicial tribunal to charge, try, convict, and punish people without courts, without juries, without lawyers, without witnesses—in short, without

any of the procedural protections that the Bill of Rights provides. The Louisiana law is reminiscent of the old Parliamentary and Ecclesiastical Commission trials which took away the liberty of John Lilburne and his contemporaries without due process of law—that is, without giving them the benefit of a trial in accordance with the law of the land. For these reasons I believe that the Louisiana law denies due process of law.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

Swept up in a constitutional revolution of its own making, the Court has a tendency to lose sight of the principles that have traditionally defined and limited its role in our political system. Constitutional adjudication is a responsibility we cannot shirk. But it is a grave and extraordinary process, one of last resort. And when it cannot legitimately be avoided, it is a function that must be performed with the utmost circumspection and precision, lest the Court's opinions emanate radiations which unintentionally, and spuriously, indicate views on matters we have not fully considered.

Over the years, the Court has evolved a number of principles designed to assure that we act within our proper confines. Perhaps the most fundamental of these is that we adjudicate only when, and to the extent that, we are presented with an actual and concrete controversy. Today, in its haste to make new constitutional doctrine, the Court turns this principle on its head, as it attempts to create a controversy out of a complaint which alleges none. With respect, I must dissent.

I.

Only last Term, in *Flast* v. *Cohen*, 392 U. S. 83 (1968), the Court reaffirmed the proposition that "when standing [to sue] is placed in issue in a case, the question is

whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . ," *id.*, at 99–100, that is, "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102. In the present context, this means, simply, that for a plaintiff to challenge a particular course of conduct pursued or threatened to be pursued by a defendant, it is not enough for the plaintiff to allege that he has been or will be injured by the defendant; the plaintiff must further claim that the injury to him (or to those whom he has status to represent [1]) results from the particular course of conduct he challenges.

Appellant in the case at bar attacks the constitutional validity of certain specific statutory procedures of the Louisiana Labor-Management Commission of Inquiry. Applying the principle stated above, it is not sufficient that he may be injured by the Commission or its members in *some* way. The injury must be alleged to arise out of, or relate to, the application of the procedures in question. The most generous reading of appellant's complaint cannot mask the simple truth that it falls short of this minimal requirement.

At the risk of wearying the reader, I must deal with appellant's pleadings in some detail. The relevant portion of the complaint, and that relied upon by the Court, is part IV ("Facts"), which contains 17 operative paragraphs.

Paragraphs 1–3 identify the plaintiff and defendants.

Paragraphs 4–6 characterize the Commission as an "executive trial agency," and outline its investigative functions. Paragraph 7 avers that the Commission's procedures for performing these functions are constitu-

[1] As the prevailing opinion notes, *ante*, at 420, and n. 3, appellant does not assign as error the District Court's holding that this was not a proper class action.

tionally defective with respect to matters of counsel, confrontation, compulsory process, rules of evidence, standards of guilt, right of appeal, and self-incrimination. Nowhere, either directly or indirectly, do these paragraphs intimate that *appellant* (or for that matter, anyone else) has been affected by the procedures themselves and their asserted effects.

Paragraph 8 should be quoted in full:

> "Furthermore complainant alleges that said defendants, their agents, representatives and employees, and those acting in concert with them, in connection with the administration of the provisions of said Act, have singled out complainant and members of Teamsters Local No. 5 as a special class of persons for repressive and willfully punitive action, solely because they are members of said Teamsters Local No. 5, in furtherance of which a deliberate effort has been made and continues to be made by said officials, spearheaded by defendant McKeithen, while acting under color of state law, to destroy the current power structure of the labor union aforesaid and said union to which complainant belongs as a member and through which he experiences economic survival, and to install a new power structure oriented and subservient to the James R. Hoffa group or clique of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; this effort has included and continues to include (a) the deliberate circulation for public consumption of willful falsehoods about members of said labor union, such as characterizing said members as 'hoodlums' and 'gangsters,' comparable in depravity to the sinister Mafia gangsters of underworld criminals, while masking such lawless conduct behind a verbal facade of law and order, (b) the indiscriminate filing of

criminal charges against members of said labor union, where there exists no justifiable basis therefor and the concomitant exaction of excessive bail bonds, (c) the intimidating of public officials into carrying out the tyrannical aims of such indiscriminate criminal prosecution, and (d) the dictatorial use of the powers of the office of Governor of Louisiana in furtherance thereof."

In paragraph 9, appellant avers, "as more specifically applies to him," that appellees conspired to file false criminal charges against him. Paragraphs 10–14 describe in detail the chronology and conduct of the resulting criminal proceedings.

Paragraph 15 alleges that appellees intimidated certain persons (not including appellant) in order to elicit false statements to bring about the prosecution of other persons (not including appellant).

Finally, paragraph 16 contains the usual averments requisite to equitable and declaratory relief, and paragraph 17 requests a temporary restraining order.

Reading and re-reading these many paragraphs of legal and factual averments, one cannot help but be struck by the conspicuous absence of any claim that *appellant* has been or will be *investigated* by the Commission, or called as a *witness* before it, or identified in its *findings*, or, indeed, subjected to any of its processes.[2] Can this lacuna be filled by implication? I believe not.

Only paragraphs 9–14 relate specifically to appellant, and they contain no hint that the filing of the criminal informations against him was the result of the Commission's use of any of the procedures which the Court today indicates are constitutionally suspect. And assuming, contrary to fact, see n. 1, *supra*, that appellant repre-

[2] And, of course, there is no suggestion that appellant ever requested that the Commission accord him any of the rights of whose absence he complains.

sents others besides himself in this action, the only other arguably germane paragraph is ¶8 (a), which alleges the "deliberate circulation for public consumption of willful falsehoods about members of said labor union." This paragraph conspicuously omits any suggestion that such "falsehoods" were the result of testimony before the Commission or that they were contained in the Commission's "findings"—a term that is repeatedly emphasized in the earlier description of the Commission's functions.

The complaint's utter failure to allege any connection between the injuries asserted to have been suffered by appellant and the procedures complained of is not, on any objective reading of the complaint, an accidental omission or the result of counsel's "inartfulness"—as my Brother MARSHALL would put it. In my view, the only plausible inference—especially when it is remembered that appellant was represented by counsel throughout this litigation—is that such allegations were omitted because appellant had no facts to support them.[3]

The prevailing opinion's strained construction of the complaint goes well beyond the principle, with which I have no quarrel, that federal pleadings should be most liberally construed. It entirely undermines an important function of the federal system of procedure—that of disposing of unmeritorious and unjusticiable claims at the outset, before the parties and courts must undergo the expense and time consumed by evidentiary hearings.

Accordingly, I would sustain the dismissal of the complaint on the ground that appellant has not shown himself to have standing to challenge the Commission's procedures.

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[3] This inference is supported by the Report of the Labor-Management Commission of Inquiry, filed in this Court, which, other than mentioning the litigation challenging the Commission, nowhere refers to this appellant.

II.

Because the complaint is barren of any indication of the manner in which appellant is affected by the Commission's formal procedures, the prevailing opinion is required to make its own assumptions. It places appellant in the vague position of "a person being investigated" by the Commission, *ante*, at 428, 429, and thence proceeds to discuss the rights of such a person to confront witnesses and to offer evidence in his own behalf. The prevailing opinion appears understandably reluctant to commit itself to very much. As I read the opinion, it does not state that any of the Commission's procedures are actually unconstitutional, but holds only that there is enough latent in the complaint that the case should proceed to trial.

Of necessity, however, my Brother MARSHALL has to examine some of the constitutional issues sought to be raised by appellant in order to justify a remand, and his discussion leaves radiations which are, at least, unclear. Reluctant as I am, under the circumstances of this case, to discuss the merits, I therefore feel compelled to outline my own views. I am not certain to what extent they comport with those of the majority.

The prevailing opinion fails to articulate what I deem to be a constitutionally significant distinction between two kinds of governmental bodies. The first is an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing. To the extent that such a determination—whether called a "finding" or an "adjudication"—finally and directly affects the substantial personal interests, I do not doubt that the Due Process Clause may require that it be accompanied by many of the traditional adjudicatory procedural safeguards. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951).

By the terms of the Louisiana legislation, the appellee Commission is not of this sort. Its authority is "investigatory and fact finding only." La. Rev. Stat. Ann. § 23:880.6 A (Supp. 1969). Its stated purpose is "to supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies of the State of Louisiana." Preamble to Act No. 2. Its duty, when it finds probable cause to believe that the criminal laws have been violated, is to "report its findings and recommendations to the proper federal and state authorities . . . charged with the responsibility for prosecution of criminal offenses," or to file charges itself. La. Rev. Stat. Ann. § 23:880.7 B (Supp. 1969). The Commission has no authority to adjudicate a person's guilt or innocence, and its recommendations and findings have no legal consequences whatsoever. *Id.*, § 23:880.7 A (Supp. 1969).

The Commission thus bears close resemblance to certain federal administrative agencies, *infra*, this page and 440, and to the offices of prosecuting attorneys. These agencies have one salient feature in common, which distinguishes them from those designed simply to "expose." None of them is the *final* arbiter of anyone's guilt or innocence. Each, rather, plays only a *preliminary* role, designed, in the usual course of events, to *initiate* a subsequent formal proceeding in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies could not otherwise practicably pursue their investigative functions, they have not been required to follow "adjudicatory" procedures.

I see no constitutionally relevant distinction between this State Commission and the federal administrative agencies that perform investigative functions designed to discover violations which may result in the initiation of criminal proceedings. In *Hannah* v. *Larche*, 363 U. S. 420, 445–448, 454–485 (1960), the Court expressly

condoned the denial of "rights such as apprisal, confrontation, and cross-examination" in such "nonadjudicative, fact-finding investigations." *Id.*, at 446. The Court recognized, for example, that the Federal Trade Commission

> "could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding . . . ." *Id.*, at 446.

And the Court said of the Securities and Exchange Commission:

> "Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed notice of the matters to be determined, . . . and a right to cross-examine witnesses appearing at the hearing, . . . those provisions of the Rules are made specifically inapplicable to investigations, . . . *even though the Commission is required to initiate civil or criminal proceedings if an investigation discloses violations of law.* Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures." *Id.*, at 446–448. (Emphasis added.)

The statutory safeguards afforded persons being investigated by the Louisiana Commission are at least equal to those provided by most of these federal agencies. See *id.*, at 454–485.

The Commission's functions also find close analogies in the investigations and determinations that take place

daily in the offices of state and federal prosecuting attorneys. In both instances, the responsible officials proceed by interrogating persons with knowledge of possible violations of the criminal law. If the prosecutor believes that an individual has committed a crime, he files an information or seeks a grand jury indictment. When the Commission reaches a similar conclusion, it turns its intelligence over to a prosecutor so that he may initiate the formal criminal process.

For obvious reasons, it has not been seriously suggested that a "person under investigation" by a district attorney has any of the "adjudicative" constitutional rights at the investigative stage.[4] These rights attach only after formal proceedings have been initiated. Nor, of course, does one under investigation have a constitutional right that the investigations be conducted in secrecy, or that the official keep his plans to prosecute confidential. The decision whether or not to disclose these matters rests in the sound discretion of the responsible public official. Various factors, such as the fear that a suspect will flee or the concern for obtaining an unbiased jury when the matter comes to trial, may militate in favor of secrecy. On the other hand, an appropriate disclosure of a pending investigation may bring forth witnesses and evidence, and serves a proper ancillary function in keeping the public informed.[5]

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[4] Of course, a person called upon to *participate* in the investigation, *e. g.*, by answering questions, may have relevant rights at this stage. Cf., *e. g.*, *Mancusi* v. *DeForte*, 392 U. S. 364 (1968). But appellant does not intimate, and the majority does not assume, that he has been or will be subpoenaed to testify or produce documents.

[5] It is ironic that appellant should complain of the open nature of the Commission's proceedings. The statutory requirement that the Commission "shall base its findings and reports only upon evidence and testimony given at public hearings," La. Rev. Stat. Ann. § 23:880.12 A (Supp. 1969), is plainly designed to *protect* witnesses and persons under investigation from what some members of

The Commission's operations differ from those of a prosecuting attorney in one important respect, however. The very formality of the Commission's investigatory process may lend greater credibility and a greater aura of official sanction to the testimony given before it and to its findings. Although in this respect the Commission is not different from the federal agencies discussed above, I am not ready to say that the collateral consequences of government-sanctioned opprobrium may not under some circumstances entitle a person to some right, consistent with the Commission's efficient performance of its investigatory duties, to have his public say in rebuttal. However, the Commission's procedures are far from being niggardly in this respect. They include not only the right to make a personal appearance, but also the right to submit the statements of others, and, under some circumstances, to present questions to adverse witnesses. This is far more than is given persons under investigation by the federal agencies, and certainly serves adequately to neutralize any adverse collateral effects of the Commission's investigative proceedings.

As I noted above, the very insubstantiality of appellant's complaint leaves it unclear what the Court holds today. It may be that some of my Brethren understand the complaint to allege that in fact the Commission acts primarily as an agency of "exposure," rather than one which serves the ends required by the state statutes. If so—although I do not believe that the complaint can be reasonably thus construed—the area of disagreement between us may be small or nonexistent.

Before the Court holds that a purely investigatory agency must adopt the full roster of adjudicative safe-

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the Court have criticized as secret inquisitions or Star Chamber proceedings. See *In re Groban*, 352 U. S. 330, 337 (1957) (BLACK, J., dissenting); *Anonymous* v. *Baker*, 360 U. S. 287, 298 (1959) (BLACK, J., dissenting).

guards, however, it would do well to heed carefully its own warning in *Hannah*, that such a requirement "would make a shambles of the investigation and stifle the agency in its gathering of facts." 363 U. S., at 444. Such a requirement would not only incapacitate state criminal investigatory bodies at a time when their need cannot be gainsaid, but would cast a broad shadow of doubt over the propriety of long-standing procedures employed by many federal agencies—procedures which less than a decade ago the Court believed to be proper and necessary.

BRANDENBURG *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 492. Argued February 27, 1969.—Decided June 9, 1969.

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. *Held:* Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney* v. *California*, 274 U. S. 357, overruled.

Reversed.

Allen Brown argued the cause for appellant. With him on the briefs were *Norman Dorsen*, *Melvin L. Wulf*, *Eleanor Holmes Norton*, and *Bernard A. Berkman*.

Leonard Kirschner argued the cause for appellee. With him on the brief was *Melvin G. Rueger*.

Paul W. Brown, Attorney General of Ohio, *pro se*, and *Leo J. Conway*, Assistant Attorney General, filed a brief for the Attorney General as *amicus curiae*.

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety

of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte*, "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present

other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

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[1] The significant portions that could be understood were:
"How far is the nigger going to—yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omittted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400–11402, the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States*, 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] As we

[2] It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis* v. *United States*, 341 U. S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States*, 354 U. S. 298, 320–324 (1957), in which the Court overturned con-

said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon* v. *Lowry*, 301 U. S. 242, 259–261 (1937); *Bond* v. *Floyd*, 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). See also *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime

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victions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

in terms of mere advocacy not distinguished from incitement to imminent lawless action.[3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled.

Reversed.

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place

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[3] The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . . ." The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism . . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State* v. *Kassay,* 126 Ohio St. 177, 184 N. E. 521 (1932), where the constitutionality of the statute was sustained.

[4] Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge* v. *Oregon, supra,* at 364: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1876); *Hague* v. *CIO,* 307 U. S. 496, 513, 519 (1939); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461 (1958).

in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis* v. *United States*, 341 U. S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a *caveat*.

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck* v. *United States*, 249 U. S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Frohwerk v. *United States*, 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." *Id.*, at 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was

in quarters where a little breath would be enough to kindle a flame." *Id.*, at 209.

Debs v. *United States*, 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.*, at 215.

> "If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." *Ibid.*

In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams* v. *United States*, 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to *Schenck*, he did not think that on the facts a case for overriding the First Amendment had been made out:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Id.*, at 628.

Another instance was *Schaefer* v. *United States*, 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce* v. *United States*, 252 U. S. 239, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debat-

able. The dissents in *Abrams, Schaefer,* and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (*Pierce* v. *United States, supra,* at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney* v. *California,* 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow* v. *New York,* 268 U. S. 652, 673:

> "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

The Court in *Herndon* v. *Lowry*, 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. *Id.*, at 259–261. And see *Hartzel* v. *United States*, 322 U. S. 680. In *Bridges* v. *California*, 314 U. S. 252, 261–263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in *Dennis* v. *United States*, 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition.[1]

In that case the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government 'as speedily as circumstances would permit.'" *Id.*, at 509–511. The Court sustained convictions under that charge, construing it to mean a determination of "'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[2] *Id.*, at 510, quoting from *United States* v. *Dennis*, 183 F. 2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. *Yates* v. *United States*, 354 U. S. 298, 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government

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[1] See McKay, The Preference For Freedom, 34 N. Y. U. L. Rev. 1182, 1203–1212 (1959).

[2] See *Feiner* v. *New York*, 340 U. S. 315, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

by violence, *Noto* v. *United States*, 367 U. S. 290, may be prosecuted. *Scales* v. *United States*, 367 U. S. 203, 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. *Barenblatt* v. *United States*, 360 U. S. 109, 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in *Dennis*, coined the "not improbable" test, 183 F. 2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term the Court held in *United States* v. *O'Brien*, 391 U. S. 367, 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

> "The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 U. S., at 377–378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 775 (DOUGLAS, J., concurring); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 501; *Hughes* v. *Superior Court*, 339 U. S. 460, 465; *Labor Board* v. *Fruit Packers*, 377 U. S. 58, 77 (BLACK, J., concurring), and *id.*, at 93 (HARLAN, J., dissenting); *Cox* v. *Louisiana*, 379 U. S. 559, 578 (opinion of BLACK, J.); *Food Employees* v. *Logan Plaza*, 391 U. S. 308, 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to

the number of pickets and the place and hours (see *Cox* v. *Louisiana, supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall*, 357 U. S. 513, 536–537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt

acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.[3]

[3] See MR. JUSTICE BLACK, dissenting, in *Communications Assn.* v. *Douds*, 339 U. S. 382, 446, 449 *et seq.*

WILLIAMS *v.* OKLAHOMA CITY ET AL.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 841. Argued April 1–2, 1969.—Decided June 9, 1969.

The denial to petitioner, an indigent who was convicted of drunken driving, of a copy at public expense of the trial transcript which he needed to perfect an appeal, to which he was entitled "as a matter of right" under Oklahoma law, is a violation of the Fourteenth Amendment.

439 P. 2d 965, reversed and remanded.

Jon F. Gray argued the cause and filed a brief for petitioner.

Giles K. Ratcliffe argued the cause for respondents. With him on the brief was *Roy H. Semtner.*

PER CURIAM.

Petitioner, an indigent, had no funds to pay for a transcript of the trial proceedings in the Municipal Criminal Court of Oklahoma City required to prepare the "case-made" needed to perfect his appeal to the Oklahoma Court of Criminal Appeals from his conviction for drunken driving and the imposition of a 90-day jail sentence and a $50 fine.* The trial proceedings had been

*The pertinent Oklahoma statutes provide as follows:

Okla. Stat. Ann., Tit. 22, § 1059 (1958):

"In all criminal cases appealable to the Criminal Court of Appeals, the appellant may prepare, and it shall be the duty of the court to provide for the preparation and settling of a case-made in all respects as in civil cases, and the case-made so settled, served and filed in the trial court may be sent to the appellate court in lieu of all other records or bills of exception; or the proceeding in the appellate court may be as provided in the next section."

Okla. Stat. Ann., Tit. 22, § 1060 (Supp. 1968):

"Instead of the appeal hereinbefore provided for, any party desiring to appeal to the Court of Criminal Appeals in any criminal

stenographically transcribed pursuant to Oklahoma law, Okla. Stat. Ann., Tit. 11, § 798 (1959), Okla. Stat. Ann., Tit. 20, §§ 110–111 (1962), but the trial court had refused in the absence of statutory authority to order that a copy be provided petitioner at public expense, although finding that petitioner was an indigent whose grounds of appeal were not without merit, and that neither petitioner nor his appointed counsel could make up a transcript of the trial proceedings from memory. The Court of Criminal Appeals, in an original proceeding brought by petitioner, also refused to order that petitioner be provided a copy at public expense. The court agreed with the trial court that no Oklahoma statute or Oklahoma City ordinance authorized such an order, and held further that the Fourteenth Amendment did not mandate "that an indigent person, convicted for a violation of a city ordinance, quasi criminal in nature and often referred to as a petty offense, is entitled to a case-made or transcript at city expense in order to perfect an appeal from said conviction." 439 P. 2d 965 (1968). We granted certiorari. 393 U. S. 998 (1968). We reverse.

"This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois,* 351 U. S. 12; *Douglas* v. *California,* 372 U. S. 353; *Lane* v. *Brown,* 372 U. S. 477; *Draper* v. *Washington,* 372 U. S. 487." *Rinaldi* v. *Yeager,* 384 U. S. 305, 310–

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case may proceed by case made and petition in error by filing notice of such intent and by making request for case made, both to be made in writing, in open court, either at the time the judgment is rendered, or within ten days thereafter. In such an appeal the case made must be settled and served and the appeal lodged within the time for such appeal as hereinbefore set out. Instead of the case made plaintiff in error may attach to his petition in error a transcript of the proceedings of record in the trial court."

311 (1966). Although the Oklahoma statutes expressly provide that "[a]n appeal to the Court of Criminal Appeals may be taken by the defendant, *as a matter of right* from any judgment against him . . . ," Okla. Stat. Ann., Tit. 22, § 1051 (Supp. 1968) (emphasis added), the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation of a "case-made." This is an "unreasoned distinction" which the Fourteenth Amendment forbids the State to make. See *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Eskridge* v. *Washington State Board*, 357 U. S. 214 (1958).

The judgment of the Court of Criminal Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

SORANNO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 838. Decided June 9, 1969.

Certiorari granted; 401 F. 2d 534, vacated and remanded.

J. B. Tietz for petitioner.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Leonard H. Dickstein* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States District Court for the Eastern District of California for further consideration in light of *McKart* v. *United States, ante,* p. 185.

MEEKER *v.* WALKER ET UX.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1293. Decided June 9, 1969.

Affirmed.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The judgment is affirmed.

RAMM *v.* RAMM.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1294. Decided June 9, 1969.

22 N. Y. 2d 926, 242 N. E. 2d 88, appeal dismissed.

Norman Ramm, appellant, *pro se*.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

JONES *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 966, Misc. Decided June 9, 1969.

Certiorari granted; 400 F. 2d 134, vacated and remanded.

Edward L. Cragen for petitioner.

Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit, and *Robert G. Maysack* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of California for further consideration in light of *Alderman* v. *United States*, 394 U. S. 165.

McNEIL *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1048, Misc. Decided June 9, 1969.

Certiorari granted; 401 F. 2d 527, vacated and remanded.

Solicitor General Griswold for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Virginia for further consideration in light of *McKart* v. *United States, ante,* p. 185.

UTAH PUBLIC SERVICE COMMISSION *v.* EL PASO NATURAL GAS CO. ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

No. 776. Argued April 29, 1969.—
Decided June 16, 1969.

In *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964), this Court ordered that appellee El Paso Natural Gas Co. divest itself of Pacific Northwest Pipeline Co., which El Paso was held to have acquired in violation of § 7 of the Clayton Act. On remand the Government and El Paso entered into a consent decree that would have transferred the illegally acquired assets to a New Company. In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967), the Court set the consent decree aside as being contrary to the divestiture mandate, which was designed to restore competition in the California market, and suggested guidelines for an appropriate decree. The District Court on the second remand then chose Colorado Interstate Gas Co. as the applicant "best qualified to make New Company a serious competitor" in the California market. El Paso was to receive 5,000,000 shares of New Company nonvoting preferred stock convertible into common stock after five years. New Company was to assume Northwest Division's pro-rata share (about $170,000,000) of El Paso's system-wide bond and debenture indebtedness. The District Court awarded the New Company 21.8% of the San Juan Basin gas reserves which it said was "no less in relation to present existing reserves" than Northwest had when it was independent, and also gave the New Company more than 50% of the net additions to the reserves developed since the merger, though concededly the New Company's total reserves will not meet the old Northwest's existing requirements and those of a California project. Appellant filed a jurisdictional statement in this Court presenting the question whether the District Court's decree comported with this Court's mandate, but later moved to dismiss its appeal under Rule 60. The motion to dismiss was supported by a number of appellees and opposed by an *amicus curiae* and a "consumer spokesman," and the Court ordered oral

argument as to whether there had been compliance with its mandate. *Held:*

1. The filing of a motion under Rule 60 to dismiss the appeal does not deprive this Court of jurisdiction to determine whether the mandate it issued in this case has been complied with. P. 466.

2. The District Court's decree does not comply with this Court's mandate. Pp. 469–472.

(a) The allocation of gas reserves (particularly those in the San Juan Basin) must place the New Company in the same relative competitive position in the California market *vis-à-vis* El Paso as Pacific Northwest occupied before the illegal merger. The District Court's decree fails to meet that objective; and that court must therefore reconsider the question of which applicant in light of the reallocation should acquire the New Company. Pp. 470–471.

(b) In order to accomplish the complete divestiture which this Court mandated all managerial and financial connections between El Paso and the New Company must be severed and there must be a cash sale of Northwest Division. Pp. 471–472.

291 F. Supp. 3, vacated and remanded.

Vernon B. Romney, Attorney General of Utah, argued the cause and filed a brief for appellant.

Leon M. Payne argued the cause and filed a brief for appellee El Paso Natural Gas Co. *Richard B. Hooper* argued the cause for appellees Cascade Natural Gas Corp. et al. With him on the brief were *Robert L. Simpson, John W. Chapman, Robert M. Robson,* Attorney General of Idaho, *Larry D. Ripley, Robert Y. Thornton,* Attorney General of Oregon, *Richard W. Sabin, Slade Gorton,* Attorney General of Washington, and *Robert E. Simpson. John F. Sonnett* argued the cause for appellee Colorado Interstate Corp. With him on the brief were *Raymond L. Falls, Jr.,* and *H. Richard Schumacher. Iver E. Skjeie,* Deputy Attorney General, argued the cause for appellee the State of California. With him on the brief was *Thomas C. Lynch,* Attorney General. *Solicitor General*

Griswold argued the cause and filed a memorandum for the United States, at the invitation of the Court. *William M. Bennett* argued the cause and filed a brief *pro se.*

Briefs of *amici curiae* were filed by *David K. Watkiss* and *James D. McKinney, Jr.*, for the Colonial Group, and by *John J. Flynn* and *I. Daniel Stewart, pro se.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is before us on appellant's motion to dismiss its appeal under Rule 60. Ordinarily parties may by consensus agree to dismissal of any appeal pending before this Court.[1] However, there is an exception where the dismissal implicates a mandate we have entered in a cause.[2] Our mandate is involved here. We therefore ordered oral argument at which all parties concerned were afforded an opportunity to be heard on the question whether there had been compliance with the mandate. 394 U. S. 970. At the oral argument a number of appellees supported appellant's motion. They included the United States, the State of California, El Paso Natural Gas Company, Cascade Natural Gas Corporation, Intermountain Gas Company, Northwest Natural Gas Company, the Wash-

[1] Rule 60 (1) provides:
"Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for [an] extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal."

[2] It was said by counsel for eight appellees at oral argument: "[W]e do not question this Court's authority to re-examine its mandate and compliance with it. We do urge, however, that your review be confined to the question whether the mandate has been carried out upon the record before this court."

ington Water Power Company, Washington Natural Gas Company, Idaho Public Utilities Commission, Public Utility Commissioner of Oregon, Washington Utilities and Transportation Commission, Colorado Interstate Corporation, Southern California Gas Company, and Southern Counties Gas Company of California. The motion was opposed by John J. Flynn and I. Daniel Stewart, by brief *amicus curiae,* and by William M. Bennett, who appeared for the State of California when the case was last here, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U. S. 129, 131 (1967), and now presents himself, and argued orally, as "consumer spokesman."

This is a Clayton Act § 7 case, 38 Stat. 731, 15 U. S. C. § 18, in which the acquisition of the stock and assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company raised the "ultimate issue" whether "the acquisition substantially lessened competition in the sale of natural gas in California." *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651, 652. We ordered divestiture "without delay." *Id.,* at 662. That was in 1964. The United States later agreed to settle the case. As to that we said:

> "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate. *United States* v. *du Pont & Co.,* 366 U. S. 316, 325. Our direction was that the District Court provide for 'divestiture without delay.' That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market." 386 U. S., at 136.

We set aside that consent decree and remanded for additional findings and a new solution, saying:

> "In the present case protection of California interests in a competitive system was at the heart of our mandate directing divestiture. For it was the absorption of Pacific Northwest by El Paso that stifled that competition and disadvantaged the California interests. It was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect." *Id.*, at 135.

On remand the District Court decided it should choose from among the various applicants the one that is "best qualified to make New Company a serious competitor" in the California market. That court chose Colorado Interstate Corp., the only gas pipeline operator among the various applicants.

Under the plan approved by the District Court, El Paso receives 5,000,000 shares of New Company nonvoting preferred stock, convertible into common stock at the end of five years. What the conversion ratio will be is not known; but, it is said, there will be provisions to restrict El Paso control over the New Company. The New Company also assumes approximately $170,000,000 of El Paso's system-wide bond and debenture indebtedness, an amount designated the Northwest Division's pro-rata share of that indebtedness.

Utah's jurisdictional statement, which she now moves to dismiss, was filed here November 25, 1968. That jurisdictional statement presents the question whether the decree entered below satisfies our mandate. It is the filing of that jurisdictional statement that brings the question here. See *United States* v. *du Pont & Co.*, 366 U. S. 316. In fact, in its jurisdictional statement, Utah urged that the decree does not meet the requirements of

du Pont. We thus need not decide whether the papers filed by *amicus curiae* or Mr. Bennett properly presented the question of compliance. We find that the decree of the District Court does not comply with our mandate: it does not apportion the gas reserves between El Paso and New Company in a manner consistent with the purpose of the mandate, and it does not provide for complete divestiture. We therefore vacate the judgment and remand the case for further proceedings.

I.

When the case was last here we said, "The gas reserves granted the New Company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company. We are told by the intervenors that El Paso gets the new reserves in the San Juan Basin—which due to their geographical propinquity to California are critical to competition in that market. But the merged company, which discovered them, represented the interests both of El Paso and of Pacific Northwest. We do not know what an equitable division would require. Hearings are necessary, followed by meticulous findings made in light of the competitive requirements to which we have adverted." 386 U. S., at 136–137.

The District Court awarded 21.8% of the San Juan Basin reserves to the New Company saying that was "no less in relation to present existing reserves" than Northwest had when it was independent. The District Court also gave the New Company more than 50% of the net additions to the reserves developed since the merger. Concededly the total reserves of the New Company will not be sufficient to meet the old Northwest's existing requirements and those of a California project.

This attempt to paralyze competition in the California market started years ago; the Clayton Act suit was filed in 1957. The record up to the entry of the present decree shows, as the District Court found, that delay has strengthened El Paso's position. *First*, the delay has strengthened El Paso's hold on the California market, making it more and more difficult for a new out-of-state supplier to enter. *Second*, an additional out-of-state supplier has entered the California market during this 12-year period, taking what well might have been the place of the old Northwest Company had not its competition been stifled. *Third*, permits for new pipelines from Texas to California are now pending before the Federal Power Commission.

The purpose of our mandate was to restore competition in the California market. An allocation of gas reserves should be made which is "equitable" with that purpose in mind. The position of the New Company must be strengthened and the leverage of El Paso not increased. That is to say, an allocation of gas reserves—particularly those in the San Juan Basin—must be made to rectify, if possible, the manner in which El Paso has used the illegal merger to strengthen its position in the California market. The object of the allocation of gas reserves must be to place New Company in the same relative competitive position *vis-à-vis* El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.

A reallocation of gas reserves under this standard may permit an applicant other than Colorado Interstate Corporation to acquire New Company and make it a competitive force in California. Thus, the District Court is directed to effect this reallocation of gas reserves, and, in light of the reallocation, to reopen consideration of which applicant should acquire New Company. Such

consideration should, of course, include whether an award to a particular applicant will have any anti-competitive effects either in the California market or in other markets.

II.

Our mandate directed complete divestiture. The District Court did not, however, direct complete divestiture. Neither appellant nor any party supporting the dismissal argues that the District Court did so. Rather they argue that the disposition made by the District Court was the best that might be made without complete divestiture. Clearly this does not comply with our mandate. *United States* v. *du Pont & Co.*, 366 U. S. 316, was another § 7 case in which we ordered "complete divestiture." *Id.*, at 328. One plan proposed was a distribution of General Motors shares held by du Pont, most of them to be distributed *pro rata* over a 10-year period to du Pont stockholders; the rest were to be sold gradually over the same 10-year period. *Id.*, at 319–320. Du Pont's alternate plan was to retain all attributes of ownership, passing through to its shareholders the voting rights proportional to their holdings of du Pont shares. We did not approve that plan but directed "complete divestiture." *Id.*, at 334. We said: "The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control." 366 U. S., at 329. We said that divestiture only of voting rights was not an adequate remedy. What was necessary was dissolution "of the intercorporate community of interest which we found to violate the law." *Id.*, at 331.

The reason advanced for allowing El Paso to take a stock interest in the New Company rather than cash is to reduce its income tax burden. We have emphasized

that the pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern. *United States* v. *du Pont & Co., supra,* at 326.

The same reasoning is applicable to the present case. Retention by El Paso and its stockholders of the preferred stock is perpetuation to a degree of the illegal intercorporate community. Assumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league. The severance of all managerial and all financial connections between El Paso and the New Company must be complete for the decree to satisfy our mandate. Only a cash sale will satisfy the rudiments of complete divestiture.

We vacate the judgment of the District Court and remand the cause for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

The action taken by the Court today will be dismaying to all who are accustomed to regard this institution as a court of law.

All semblance of judicial procedure has been discarded in the headstrong effort to reach a result that four members of this Court believe desirable. In violation of the Court's rules, the majority asserts the power to dispose of this case according to its own notions, despite the fact that all the parties participating in the lower court proceedings are satisfied that the District Court's decree is in the public interest. The majority seeks to justify this extraordinary step on the ground that District Judge

Chilson's painstaking opinion of over 30 pages is in violation of the mandate issued in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967), although (1) we have heard no oral argument directed to this question [1] and (2) we have not ordered the interested parties to file full briefs on this issue. Actually, as will appear, what the Court has done is to substitute, *sua sponte*, a new mandate for its old one. I cannot possibly subscribe to such an abuse of the judicial process.

Moreover, even if the impropriety of the Court's precipitate course is swallowed, it seems to me clear that the District Court's decision in the present case did not violate any prior mandate this Court has entered in this long and complicated litigation.[2] Rather than frustrat-

[1] The Court's opinion incorrectly states that we "ordered oral argument at which all parties concerned were afforded an opportunity to be heard on the question whether there had been compliance with the mandate." *Ante*, at 466. The complete text of the Court's order directing a hearing unequivocally shows that the parties were requested to address themselves only to the motion filed by the State of Utah requesting permission to dismiss its appeal and that the parties were not asked to argue the merits of the appeal:

"The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires. MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter." 394 U. S. 970 (1969).

Pursuant to the Court's order, the parties used their limited time for oral argument in an effort to satisfy the Court that they had acted properly in refusing to take an appeal from the District Court's decision. No party presented any substantial arguments on the merits of this case.

[2] See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, *supra*; *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964); cf. *California* v. *Federal Power Commission*, 369 U. S. 482 (1962).

ing *Cascade*'s command that "a new company be at once restored to a position where it could compete with El Paso in the California market," 386 U. S., at 136, Judge Chilson's decree adopted the solution which, so far as one can now tell, most effectively realized the goals of § 7 of the Clayton Act. Indeed, it is unlikely that as a result of the Court's order today, California's natural gas consumers will ever obtain the benefits of competition that this lawsuit was intended to achieve when it was initiated by the Department of Justice in 1957.

I.

In addition to 17 private parties, the States of California, Arizona, Nevada, Utah, and Washington intervened in the proceedings below. The Department of Justice of course represented the interests of the United States as plaintiff, and the Federal Power Commission participated as *amicus curiae*. Only the State of Utah, however, chose to file a Jurisdictional Statement in this Court challenging Judge Chilson's decree. All other parties have signified their belief that the District Court's judgment is satisfactory. The State of Utah now wishes to dismiss its appeal, reasonably suggesting that its interests in the present dispute are peripheral, and that if the State of California and the United States do not believe that the decree will prejudice the interests of California's consumers, Utah considers it inappropriate to contest the matter further.

The majority, however, refuses to permit Utah to dismiss its appeal, despite the command of Rule 60 of the rules of this Court:

> "*Whenever* the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for [an]

> extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk *shall, without further reference to the court, enter an order of dismissal.*" (Emphasis supplied.)

The language of the rule could not be clearer—the parties to a lawsuit are given the absolute right to dismiss their appeal without judicial scrutiny. Since 1858, the rules of this Court have expressly recognized the existence of this right, see Revised Rules of the Sup. Ct. of the United States, Rule No. 29 (1858),[3] and I have found no decision in which this right has ever been questioned or limited. Nevertheless, the Court today, without any discussion whatever, ignores the heretofore unquestioned interpretation of the rule and declares that "there is an exception where the dismissal implicates a mandate we have entered in a cause." *Ante*, at 466.

In handing down this *ipse dixit*, the Court not only overlooks the teachings of more than a century of judi-

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[3] Rule 29 provided:

"Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing, directing the case to be dismissed, and specifying the terms upon which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court."

While this rule by its terms provided for dismissal of cases only during vacation, there is no indication that a different procedure was followed during the Term. Surely there would be little reason to permit automatic dismissal during vacation but forbid it at other times.

Rule 29, with minor amendments, was a part of the Court's rules until July 1, 1954, when it was replaced by the present Rule 60.

cial practice, but also undermines the basic policies which support Rule 60. The rule is not a mere technicality but is predicated upon the classical view that it is the function of this Court to decide controversies between parties only when they cannot be settled by the litigants in any other way. See *Marbury* v. *Madison*, 1 Cranch 137 (1803). On this view of the judicial process, it is difficult to perceive why the Court should feel constrained to enforce its mandate when the parties have subsequently agreed, in a completely voluntary and bona fide way, that a different solution will better accommodate their interests. We have labor enough in deciding those pressing disputes which the parties are unable to resolve; there is no need to "do justice" when no litigant is complaining that a wrong has been committed. Nor will it do to say, as the Court seems to suggest, that antitrust decrees, being affected with a public interest, as they surely are, are always subject to *sua sponte* enforcement by the Court. "Enforcement" of the laws of the United States is the province of the Executive Branch. It is no more a proper function of this Court to thwart the Department of Justice when it decides to terminate an antitrust litigation than it is to order this department of the Executive Branch to commence an antitrust case which some members of this Court may feel should be brought.[4]

Although the Court's decision to police its own mandates *sua sponte* thus offends fundamental conceptions

[4] It is of course perfectly appropriate for a court to make an independent judgment as to the merits of an antitrust consent decree which the parties submit for approval. See, *e. g.*, *United States* v. *Pan American World Airways, Inc.*, 1959 Trade Cas. ¶69,300, at 75,138 (D. C. S. D. N. Y.). For in the consent decree context, the parties are requesting affirmative action from the judiciary in order to resolve their dispute, while in the situation we confront, none of the parties are requesting further judicial relief.

of the judicial process, I do not mean to suggest that this Court lacks the *constitutional* power to act in the way it has done. Cf. *Continental Co.* v. *United States*, 259 U. S. 156, 165–166 (1922). The Court does have a legitimate interest in maintaining the integrity of its mandates within the entire judicial system and it may be argued that the lower courts will not conscientiously effectuate our decisions unless all know that the Court will act when it learns of abuses. Yet, although this argument may be enough to establish the constitutionality of a practice in which this Court sits as an investigatory body with a roving commission to travel the length and breadth of this land policing its mandates, Rule 60 indicates that such an extraordinary departure from traditional judicial norms has never been thought necessary to insure the integrity of our mandates. Even during periods of history in which there was a greater risk that lower courts would seek to frustrate our decisions, it has been considered sufficient to rely upon the parties to bring violations of a mandate to our attention either by prosecuting a second appeal or by petitioning for a writ of mandamus.[5]

I see no reason why we should turn our back on such basic traditions at this late date. Moreover, if we are to take such drastic action, surely we should not do so in an *ad hoc* manner, under the pressures of the closing days of the Term. Rather, if we are to change Rule 60, we should do so in an appropriate rule-making proceeding, in which the arguments on both sides of the question may be canvassed with the dispassionate neutrality that is appropriate.

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[5] See *In re Potts*, 166 U. S. 263 (1897); cf. *In re Sanford Fork & Tool Co.*, 160 U. S. 247 (1895); *Ex parte The Union Steamboat Co.*, 178 U. S. 317 (1900).

For all of these reasons, I would grant Utah's motion to dismiss its appeal and put an end to this 12-year-old lawsuit.[6]

II.

It is with great hesitation that I turn to consider the Court's decision finding Judge Chilson's decree in violation of *Cascade*'s mandate. The case before us is one of enormous complexity. In addition to the plaintiff and defendant, 22 intervenors and nine applicants for the acquisition of the New Company participated in the proceedings below. Judge Chilson heard testimony for more than three months; the record in this case covers more than 14,000 pages, not to mention voluminous exhibits. And yet, we have not received any briefs which even attempt a complete discussion either of the merits of this case or of the question whether our mandate has been followed in a satisfactory way. The Jurisdictional Statement submitted by the State of Utah properly does not suggest that this case is suitable for summary disposition and simply attempts to persuade the Court that the questions presented are substantial. The documents filed in support of Judge Chilson's decision are no more satisfactory. While many of the parties who participated below have tendered motions in support of Utah's request to dismiss its appeal, these papers principally discuss the reasons why each party was satisfied with the result reached below and do not attempt a full-scale analysis of the merits of this extended and complicated controversy. Only the Mem-

[6] The Court does not decide whether the papers opposing Utah's motion to dismiss which were presented by John J. Flynn and I. Daniel Stewart, as *amicus curiae*, and those tendered by William M. Bennett, as "consumer spokesman," may be properly considered at this late stage in the proceedings. Since the Court does not reach this question, I do not believe it appropriate to state my views on the matter; nor have I believed it proper to consider in any way the arguments made by Messrs. Flynn, Stewart, and Bennett.

orandum submitted by the Solicitor General deals with the substance of the case in any significant way, since it contains the Government's Motion to Affirm which had been prepared as an answer to Utah's Jurisdictional Statement. Yet the Government's 18-page document does not pretend to deal thoroughly with this case's factual intricacies.

Despite the inadequate briefing, however, enough emerges from the record to suggest that, far from disobeying *Cascade*'s mandate, Judge Chilson made a decision which may well be the only one which realistically promises to fulfill the purposes of the Clayton Act.

The District Court found that "time is of the essence" if the New Company is to compete successfully in the California market. 291 F. Supp. 3, 28. Judge Chilson's analysis of the competitive situation existing today powerfully supports his conclusion that the chances of successful entry are becoming more remote with every passing year. The District Court noted that when this lawsuit began in 1957, El Paso was the only out-of-state supplier in the California market; in contrast, two additional strong companies have entered the State in the past decade. Moreover:

> "Although the expanding California market appears to offer opportunities for New Company to enter the market, the recommendation of the Federal Power Commission staff that a 42-inch pipeline should be constructed to California is a matter of grave concern, for according to the evidence before the Court, a 42-inch line would serve all increments to the southern California market for the foreseeable future. The Supreme Court recognized that competition in the California market is limited to future increments, which have not yet been certified for service. Once an increment has been certified, it is withdrawn from competition. The recommenda-

> tions of the Commission's staff for the construction of a 42-inch line have been commended by the FPC examiner in a current proceeding as 'bold and constructive.'. . .
>
> . . . . .
>
> "The Government . . . [in] its Brief . . . states: 'It is too early to predict the ultimate direction or final outcome of this current FPC proceeding. The opportunity it presents to the new company which is to emerge from this law suit is evident. If a full scale 42-inch proceeding gets underway . . . the new company should be equipped to enter as a contender with at least the minimum qualifications for serious consideration.' " 291 F. Supp., at 27–28.

The District Court found that the Colorado Interstate Gas Company (CIG) was the only potential purchaser which had a real opportunity to convince the FPC that it should operate the new Texas pipeline that holds the key to successful competition in California. Surely this finding has a substantial basis in fact, since no other prospective purchaser of the New Company has ever operated a pipeline and only one has ever had any connection at all with the oil and gas industry. Nevertheless, the Court today substantially decreases the chances of successful competition by the New Company by requiring years more litigation before the day will come when operations finally commence. During this lengthy period, existing gas companies will become even more solidly entrenched in the market and the Texas pipeline proceeding may well have progressed to the point where the New Company could not obtain serious consideration from the FPC.

Despite the fact that the Clayton Act may well be the loser, the majority prolongs this lawsuit for two reasons. First, it is said that the District Court violated *Cascade*'s requirement that "[t]he gas reserves granted the New

Company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company." 386 U. S., at 136–137. But the Court's own discussion of this question unmistakably demonstrates that Judge Chilson fully complied with this branch of *Cascade*'s mandate. The Court cannot and does not deny that Judge Chilson granted reserves to the New Company which are " 'no less in relation to present existing reserves' than Northwest had when it was independent." See *ante*, at 469. The only question that remains is whether the District Court decreed an "equitable" division of gas resources discovered since the merger. The answer to this question also seems quite easy, since the Court does not deny that Judge Chilson granted New Company about 50% of these reserves, which is much more than its proportionate share of the assets.

Although this equal division seems more than equitable to the New Company, the majority fastens on the fact that even with this distribution of resources, the New Company will not be assured of sufficient gas both to meet the anticipated demand of New Company's present customers in the Pacific Northwest and to satisfy the requirements of its potential customers in the California market. This indeed would be a source of concern if it were found that New Company could not practically obtain additional gas resources if it decides to compete in California. But Judge Chilson concluded that just the opposite situation obtains; the District Court found that the New Company "can obtain the reserves necessary to compete in the California market." 291 F. Supp., at 20. The Court, however, ignores this finding completely and does not even attempt to show how, given this fact, New Company's equal share of reserves can

in any sense be called "inequitable." Indeed, it is perfectly clear that the Court, under the guise of enforcing its mandate, is really creating a new, and more stringent, standard by which to test this divestiture. But surely this is completely illegitimate in a case where no party has challenged the legality of the District Court's decision, and where, at the most, the issue is the lower court's compliance with our previous mandate.

The Court's second ground for claiming disobedience with *Cascade*'s command is equally untenable. It is said that *Cascade* ordered "complete divestiture" without delay and we are told that no divestiture can be complete unless there is a cash sale. Since the trial court did not order a cash sale, the majority finds that *Cascade*'s mandate has not been obeyed.

There are several things wrong with this line of argument. First, *Cascade* expressly states that a cash sale is *not* required under the standards it sets down:

> "Disposition of all of the stock *with all convenient speed* is necessary and conditions must be imposed to make sure that El Paso interests do not acquire a controlling interest." 386 U. S., at 141. (Emphasis supplied.)

Since *Cascade* did not require a cash sale it is difficult to see how the present divestiture plan, in which all the common stock of the New Company is transferred to CIG is a *per se* violation of this Court's earlier mandate. Once again, the Court has created a new standard for judging the validity of the District Court's decision instead of limiting itself to a consideration of whether the decree fulfilled *Cascade*'s demand "that El Paso interests do not acquire a controlling interest" in the New Company.

I pass, then, to consider whether the divestiture plan before us violates our mandate in permitting El Paso

domination of its competitor. While this standard is a rather vague one, MR. JUSTICE DOUGLAS, speaking for the Court in *Cascade*, gave it specific content by explaining why the proposed terms of divestiture then under review were unsatisfactory. This explanation is of the highest importance in determining whether Judge Chilson's decree contravened *Cascade*'s command and it must be considered with care. MR. JUSTICE DOUGLAS began his analysis by noting that the decree had taken some steps to insulate the New Company from El Paso control since it did bar El Paso officers, directors, and owners of more than one-half of one percent of El Paso stock from buying into New Company at the public offering. The Court, however, found this limitation insufficient because:

> "the decree does not prohibit members of the families of such prohibited purchasers from obtaining New Company stock. Further, under the terms of the decree, it would be possible for a group of El Paso stockholders, each with less than one-half of one percent of El Paso stock, to acquire at the initial public offering enough New Company stock substantially to influence or even to dominate the New Company. Or, such a group could combine with the families of prohibited purchasers in order to control the New Company. After the exchange or public offering, there is no restriction on the number of New Company shares El Paso shareholders may acquire. Thus, there is a danger that major El Paso stockholders may, subsequent to the exchange or public offering, purchase large blocks of New Company stock and obtain effective control." 386 U. S., at 140–141.

Judge Chilson's decree took steps to remedy each and every defect MR. JUSTICE DOUGLAS noted in *Cascade*. No members of the immediate family of any officer,

director, or owner of one-half of one percent of El Paso shares may convert their nonvoting preference shares into voting common shares at any time. Moreover, any person who acts in concert with any director, officer, or substantial owner of El Paso is included within the ban. In addition, these same individuals are not permitted to obtain control of significant proportions of CIG stock, thereby achieving control over the New Company indirectly. Officers, directors, and their associates are barred from owning more than one-tenth of one percent of CIG stock during the next 10 years and substantial owners of El Paso may not own more than 5% of the outstanding common stock of CIG.[7]

It may be that, on appeal, even these stringent conditions may not be found to have fully satisfied the purposes of the Clayton Act. A decision of this question would of course require an analysis of the financial structure of El Paso in order to determine whether it was possible for the Company or its owners to evade the conditions imposed upon them. But it is surely impossible to hold on this record that Judge Chilson's decree is a violation of the mandate issued in *Cascade* when the present divestiture plan manifests a conscientious effort to comply with all of the suggestions advanced

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[7] These conditions were approved by the District Court on November 7, 1968, in an order approving the Implementing Documents filed by the appropriate parties pursuant to Judge Chilson's decision naming CIG as the successful applicant. The Implementing Documents are a part of the record in this case.

In addition to the restrictions mentioned in the text, the District Court also forbade El Paso's officers and directors as well as their associates, from owning more than one-tenth of one percent of New Company stock for the next 10 years; moreover, El Paso and its affiliates are forbidden to acquire any New Company or CIG stock at any time in the future. Steps have also been taken to assure that El Paso will have no officers or directors in common with New Company or CIG.

by the Court in that opinion.[8] Indeed, the majority today does not even attempt to make such a claim. Instead, it ignores the fact that the District Court carefully framed conditions to assure the New Company's independence. At no point in its brief opinion does the Court analyze this aspect of Judge Chilson's decree, contenting itself with the cryptic comment that "it is said . . . [that] there will be provisions to restrict El Paso control over the New Company." *Ante,* at 468.

III.

The Court's conclusion that its mandate has been disobeyed is, in short, based upon completely erroneous factual premises born of a superficial acquaintance with this 14,000-page record. This is not surprising since the majority has seen fit to decide this important case without the benefit of significant oral or written argument. And yet it is upon this tenuous basis that the Court has chosen to shatter centuries of judicial tradition in order to reach a decision which does not even promise to further the interests of California's gas consumers.

What eventuates today evinces a course of unjudicial action that transcends even that which marked the last appearance of the case in this Court. See the dissenting opinion of STEWART, J., in *Cascade,* 386 U. S. 129, 143.

I respectfully dissent.

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[8] The Court relies heavily on *United States* v. *du Pont & Co.,* 366 U. S. 316 (1961), to support its claim that *Cascade*'s mandate has been breached. But *du Pont* only holds that the District Court must assure itself that "the intercorporate community of interest which we found to violate the law" must be dissolved by divestiture. 366 U. S., at 331. Nothing in *du Pont* suggests, let alone holds, that a cash sale is the only way to accomplish this objective. Like *Cascade, du Pont* established no *per se* rule in this area.

POWELL ET AL. *v.* McCORMACK, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 138. Argued April 21, 1969.—
Decided June 16, 1969.

Petitioner Powell, who had been duly elected to serve in the House of Representatives for the 90th Congress, was denied his seat by the adoption of House Resolution No. 278 which the Speaker had ruled was on the issue of excluding Powell and could be decided by majority vote. The House's action followed charges that Powell had misappropriated public funds and abused the process of the New York courts. Powell and certain voters of his congressional district thereafter brought suit in the District Court for injunctive, mandatory, and declaratory relief against respondents, certain named House members, the Speaker, Clerk, Sergeant at Arms, and Doorkeeper of the House, alleging that the Resolution barring his seating violated Art. I, § 2, cl. 1, of the Constitution as contrary to the mandate that House members be elected by the people of each State and cl. 2 which sets forth the qualifications for membership of age, citizenship, and residence (all concededly met by Powell), which they claimed were exclusive. The complaint alleged that the House Clerk threatened to refuse to perform the service to which Powell as a duly elected Congressman was entitled; that the Sergeant at Arms refused to pay Powell's salary; and that the Doorkeeper threatened to deny Powell admission to the House chamber. The District Court granted respondents' motion to dismiss the complaint "for want of jurisdiction of the subject matter." The Court of Appeals affirmed on somewhat different grounds. While the case was pending in this Court, the 90th Congress ended and Powell was elected to and seated by the 91st Congress. Respondents contend that (1) the case is moot; (2) the Speech or Debate Clause (Art. I, § 6) forecloses judicial review; (3) the decision to exclude Powell is supported by the expulsion power in Art. I, § 5, under which the House, which "shall be the Judge of the . . . Qualifications of its own Members," can by a two-thirds vote (exceeded here) expel a member for any reason at all; (4) the Court lacks subject matter jurisdiction over this litigation, or, alternatively,

(5) the litigation is not justiciable under general criteria or because it involves a political question. *Held:*

1. The case has not been mooted by Powell's seating in the 91st Congress, since his claim for back salary remains a viable issue. Pp. 495–500.

(a) Powell's averments as to declaratory relief are sufficient. *Alejandrino* v. *Quezon*, 271 U. S. 528, distinguished. Pp. 496–499.

(b) The mootness of Powell's claim to a seat in the 90th Congress does not affect the viability of his back salary claim with respect to the term for which he was excluded. *Bond* v. *Floyd*, 385 U. S. 116. Pp. 499–500.

2. Although the Speech or Debate Clause bars action against respondent Congressmen, it does not bar action against the other respondents, who are legislative employees charged with unconstitutional activity, *Kilbourn* v. *Thompson*, 103 U. S. 168; *Dombrowski* v. *Eastland*, 387 U. S. 82; and the fact that House employees are acting pursuant to express orders of the House does not preclude judicial review of the constitutionality of the underlying legislative decision. Pp. 501–506.

3. House Resolution No. 278 was an exclusion proceeding and cannot be treated as an expulsion proceeding (which House members have viewed as not applying to pre-election misconduct). This Court will not speculate whether the House would have voted to expel Powell had it been faced with that question. Pp. 506–512.

4. The Court has subject matter jurisdiction over petitioners' action. Pp. 512–516.

(a) The case is one "arising under" the Constitution within the meaning of Art. III, since petitioners' claims "will be sustained if the Constitution . . . [is] given one construction and will be defeated if it [is] given another." *Bell* v. *Hood*, 327 U. S. 678. Pp. 513–514.

(b) The district courts are given a broad grant of jurisdiction by 28 U. S. C. § 1331 (a), over "all civil actions wherein the matter in controversy . . . arises under the Constitution . . ." and while that grant is not entirely co-extensive with Art. III, there is no indication that § 1331 (a) was intended to foreclose federal courts from entertaining suits involving the seating of Congressmen. Pp. 514–516.

5. This litigation is justiciable because the claim presented and the relief sought can be judicially resolved. Pp. 516–518.

(a) Petitioners' claim does not lack justiciability on the ground that the House's duty cannot be judicially determined, since if

petitioners are correct the House had a duty to seat Powell once it determined that he met the standing qualifications set forth in the Constitution. P. 517.

(b) The relief sought is susceptible of judicial resolution, since regardless of the appropriateness of a coercive remedy against House personnel (an issue not here decided) declaratory relief is independently available. Pp. 517–518.

6. The case does not involve a "political question," which under the separation-of-powers doctrine would not be justiciable. Pp. 518–549.

(a) The Court's examination of relevant historical materials shows at most that Congress' power under Art. I, § 5, to judge the "Qualifications of its Members" is a "textually demonstrable constitutional commitment . . . to [that] co-ordinate political department of government" (*Baker* v. *Carr*, 369 U. S. 186, 217) to judge only standing qualifications which are expressly set forth in the Constitution; hence, the House has no power to exclude a member-elect who meets the Constitution's membership requirements. Pp. 518–548.

(b) The case does not present a political question in the sense, also urged by respondents, that it would entail a "potentially embarrassing confrontation between coordinate branches" of the Government, since our system of government requires federal courts on occasion to interpret the Constitution differently from other branches. Pp. 548–549.

7. In judging the qualifications of its members under Art. I, § 5, Congress is limited to the standing qualifications expressly prescribed by the Constitution. P. 550.

129 U. S. App. D. C. 354, 395 F. 2d 577, affirmed in part, reversed in part, and remanded to the District Court for entry of a declaratory judgment and for further proceedings.

Arthur Kinoy and *Herbert O. Reid* argued the cause for petitioners. With them on the brief were *Robert L. Carter, Hubert T. Delany, William Kunstler, Frank D. Reeves,* and *Henry R. Williams.*

Bruce Bromley argued the cause for respondents. With him on the brief were *John R. Hupper, Thomas D. Barr, Lloyd N. Cutler, John H. Pickering, Louis F. Oberdorfer,* and *Max O. Truitt, Jr.*

Briefs of *amici curiae* were filed by *Ernest Angell, Osmond K. Fraenkel, Edward J. Ennis, Melvin L. Wulf, Eleanor Holmes Norton,* and *Alan H. Levine* for the American Civil Liberties Union et al., and by *George Meader.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In November 1966, petitioner Adam Clayton Powell, Jr., was duly elected from the 18th Congressional District of New York to serve in the United States House of Representatives for the 90th Congress. However, pursuant to a House resolution, he was not permitted to take his seat. Powell (and some of the voters of his district) then filed suit in Federal District Court, claiming that the House could exclude him only if it found he failed to meet the standing requirements of age, citizenship, and residence contained in Art. I, § 2, of the Constitution—requirements the House specifically found Powell met—and thus had excluded him unconstitutionally. The District Court dismissed petitioners' complaint "for want of jurisdiction of the subject matter." A panel of the Court of Appeals affirmed the dismissal, although on somewhat different grounds, each judge filing a separate opinion. We have determined that it was error to dismiss the complaint and that petitioner Powell is entitled to a declaratory judgment that he was unlawfully excluded from the 90th Congress.

I.

FACTS.

During the 89th Congress, a Special Subcommittee on Contracts of the Committee on House Administration conducted an investigation into the expenditures of the Committee on Education and Labor, of which petitioner

Adam Clayton Powell, Jr., was chairman. The Special Subcommittee issued a report concluding that Powell and certain staff employees had deceived the House authorities as to travel expenses. The report also indicated there was strong evidence that certain illegal salary payments had been made to Powell's wife at his direction. See H. R. Rep. No. 2349, 89th Cong., 2d Sess., 6–7 (1966). No formal action was taken during the 89th Congress. However, prior to the organization of the 90th Congress, the Democratic members-elect met in caucus and voted to remove Powell as chairman of the Committee on Education and Labor. See H. R. Rep. No. 27, 90th Cong., 1st Sess., 1–2 (1967).

When the 90th Congress met to organize in January 1967, Powell was asked to step aside while the oath was administered to the other members-elect. Following the administration of the oath to the remaining members, the House discussed the procedure to be followed in determining whether Powell was eligible to take his seat. After some debate, by a vote of 363 to 65 the House adopted House Resolution No. 1, which provided that the Speaker appoint a Select Committee to determine Powell's eligibility. 113 Cong. Rec. 26–27. Although the resolution prohibited Powell from taking his seat until the House acted on the Select Committee's report, it did provide that he should receive all the pay and allowances due a member during the period.

The Select Committee, composed of nine lawyer-members, issued an invitation to Powell to testify before the Committee. The invitation letter stated that the scope of the testimony and investigation would include Powell's qualifications as to age, citizenship, and residency; his involvement in a civil suit (in which he had been held in contempt); and "[m]atters of . . . alleged official misconduct since January 3, 1961." See Hearings on

H. R. Res. No. 1 before Select Committee Pursuant to H. R. Res. No. 1, 90th Cong., 1st Sess., 5 (1967) (hereinafter Hearings). Powell appeared at the Committee hearing held on February 8, 1967. After the Committee denied in part Powell's request that certain adversary-type procedures be followed,[1] Powell testified. He would, however, give information relating only to his age, citizenship, and residency; upon the advice of counsel, he refused to answer other questions.

On February 10, 1967, the Select Committee issued another invitation to Powell. In the letter, the Select Committee informed Powell that its responsibility under the House Resolution extended to determining not only whether he met the standing qualifications of Art. I, § 2, but also to "inquir[ing] into the question of whether you should be punished or expelled pursuant to the powers granted . . . the House under Article I, Section 5, . . . of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to . . . seating, expulsion or other punishment." See Hearings 110. Powell did

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[1] Powell requested that he be given (1) notice of the charges pending against him, including a bill of particulars as to any accuser; (2) the opportunity to confront any accuser, to attend all committee sessions where evidence was given, and the right to cross-examine all witnesses; (3) public hearings; (4) the right to have the Select Committee issue its process to summon witnesses for his defense; (5) and a transcript of every hearing. Hearings on H. R. Res. No. 1 before Select Committee Pursuant to H. R. Res. No. 1, 90th Cong., 1st Sess., 54 (1967).

The Select Committee noted that it had given Powell notice of the matters it would inquire into, that Powell had the right to attend all hearings (which would be public) with his counsel, and that the Committee would call witnesses upon Powell's written request and supply a transcript of the hearings. *Id.*, at 59.

not appear at the next hearing, held February 14, 1967. However, his attorneys were present, and they informed the Committee that Powell would not testify about matters other than his eligibility under the standing qualifications of Art. I, § 2. Powell's attorneys reasserted Powell's contention that the standing qualifications were the exclusive requirements for membership, and they further urged that punishment or expulsion was not possible until a member had been seated. See Hearings 111–113.

The Committee held one further hearing at which neither Powell nor his attorneys were present. Then, on February 23, 1967, the Committee issued its report, finding that Powell met the standing qualifications of Art. I, § 2. H. R. Rep. No. 27, 90th Cong., 1st Sess., 31 (1967). However, the Committee further reported that Powell had asserted an unwarranted privilege and immunity from the processes of the courts of New York; that he had wrongfully diverted House funds for the use of others and himself; and that he had made false reports on expenditures of foreign currency to the Committee on House Administration. *Id.*, at 31–32. The Committee recommended that Powell be sworn and seated as a member of the 90th Congress but that he be censured by the House, fined $40,000 and be deprived of his seniority. *Id.*, at 33.

The report was presented to the House on March 1, 1967, and the House debated the Select Committee's proposed resolution. At the conclusion of the debate, by a vote of 222 to 202 the House rejected a motion to bring the resolution to a vote. An amendment to the resolution was then offered; it called for the exclusion of Powell and a declaration that his seat was vacant. The Speaker ruled that a majority vote of the House would be sufficient to pass the resolution if it were so

amended. 113 Cong. Rec. 5020. After further debate, the amendment was adopted by a vote of 248 to 176. Then the House adopted by a vote of 307 to 116 House Resolution No. 278 in its amended form, thereby excluding Powell and directing that the Speaker notify the Governor of New York that the seat was vacant.

Powell and 13 voters of the 18th Congressional District of New York subsequently instituted this suit in the United States District Court for the District of Columbia. Five members of the House of Representatives were named as defendants individually and "as representatives of a class of citizens who are presently serving . . . as members of the House of Representatives." John W. McCormack was named in his official capacity as Speaker, and the Clerk of the House of Representatives, the Sergeant at Arms and the Doorkeeper were named individually and in their official capacities. The complaint alleged that House Resolution No. 278 violated the Constitution, specifically Art. I, § 2, cl. 1, because the resolution was inconsistent with the mandate that the members of the House shall be elected by the people of each State, and Art. I, § 2, cl. 2, which, petitioners alleged, sets forth the exclusive qualifications for membership.[2] The complaint further alleged that the Clerk of the House threatened to refuse to perform the service for Powell to which a duly elected Congressman is entitled, that the Sergeant at Arms refused to pay Powell his salary, and that the Doorkeeper threatened to deny Powell admission to the House chamber.

[2] The complaint also attacked the House Resolution as a bill of attainder, an *ex post facto* law, and as cruel and unusual punishment. Further, petitioners charged that the hearing procedures adopted by the Select Committee violated the Due Process Clause of the Fifth Amendment.

Petitioners asked that a three-judge court be convened.[3] Further, they requested that the District Court grant a permanent injunction restraining respondents from executing the House Resolution, and enjoining the Speaker from refusing to administer the oath, the Clerk from refusing to perform the duties due a Representative, the Sergeant at Arms from refusing to pay Powell his salary, and the Doorkeeper from refusing to admit Powell to the Chamber.[4] The complaint also requested a declaratory judgment that Powell's exclusion was unconstitutional.

The District Court granted respondents' motion to dismiss the complaint "for want of jurisdiction of the subject matter." *Powell* v. *McCormack,* 266 F. Supp. 354 (D. C. D. C. 1967).[5] The Court of Appeals for the District of Columbia Circuit affirmed on somewhat different grounds, with each judge of the panel filing a separate opinion. *Powell* v. *McCormack,* 129 U. S. App. D. C. 354, 395 F. 2d 577 (1968). We granted certiorari. 393 U. S. 949 (1968). While the case was pending on our docket, the 90th Congress officially terminated and the 91st Congress was seated. In November 1968, Powell was again elected as the representative of the 18th Congressional District of New York and he was seated by the 91st Congress. The resolution seating Powell also

[3] The District Court refused to convene a three-judge court and the Court of Appeals affirmed. Petitioners did not press this issue in their petition for writ of certiorari, apparently recognizing the validity of the Court of Appeals' ruling. See *Stamler* v. *Willis,* 393 U. S. 217 (1968).

[4] Petitioners also requested that a writ of mandamus issue ordering that the named officials perform the same acts.

[5] The District Court entered its order April 7, 1967, and a notice of appeal was filed the same day. On April 11, 1967, Powell was re-elected to the House of Representatives in a special election called to fill his seat. The formal certification of election was received by the House on May 1, 1967, but Powell did not again present himself to the House or ask to be given the oath of office.

fined him $25,000. See H. R. Res. No. 2, 91st Cong., 1st Sess., 115 Cong. Rec. H21 (daily ed., January 3, 1969). Respondents then filed a suggestion of mootness. We postponed further consideration of this suggestion to a hearing on the merits. 393 U. S. 1060 (1969).

Respondents press upon us a variety of arguments to support the court below; they will be considered in the following order. (1) Events occurring subsequent to the grant of certiorari have rendered this litigation moot. (2) The Speech or Debate Clause of the Constitution, Art. I, § 6, insulates respondents' action from judicial review. (3) The decision to exclude petitioner Powell is supported by the power granted to the House of Representatives to expel a member. (4) This Court lacks subject matter jurisdiction over petitioners' action. (5) Even if subject matter jurisdiction is present, this litigation is not justiciable either under the general criteria established by this Court or because a political question is involved.

II.

Mootness.

After certiorari was granted, respondents filed a memorandum suggesting that two events which occurred subsequent to our grant of certiorari require that the case be dismissed as moot. On January 3, 1969, the House of Representatives of the 90th Congress officially terminated, and petitioner Powell was seated as a member of the 91st Congress. 115 Cong. Rec. H22 (daily ed., January 3, 1969). Respondents insist that the gravamen of petitioners' complaint was the failure of the 90th Congress to seat petitioner Powell and that, since the House of Representatives is not a continuing body [6]

[6] Respondents' authority for this assertion is a footnote contained in *Gojack* v. *United States*, 384 U. S. 702, 707, n. 4. (1966): "Neither the House of Representatives nor its committees are continuing bodies."

and Powell has now been seated, his claims are moot. Petitioners counter that three issues remain unresolved and thus this litigation presents a "case or controversy" within the meaning of Art. III:[7] (1) whether Powell was unconstitutionally deprived of his seniority by his exclusion from the 90th Congress; (2) whether the resolution of the 91st Congress imposing as "punishment" a $25,000 fine is a continuation of respondents' allegedly unconstitutional exclusion, see H. R. Res. No. 2, 91st Cong., 1st Sess., 115 Cong. Rec. H21 (daily ed., January 3, 1969); and (3) whether Powell is entitled to salary withheld after his exclusion from the 90th Congress. We conclude that Powell's claim for back salary remains viable even though he has been seated in the 91st Congress and thus find it unnecessary to determine whether the other issues have become moot.[8]

Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. See E. Borchard, Declara-

[7] The rule that this Court lacks jurisdiction to consider the merits of a moot case is a branch of the constitutional command that the judicial power extends only to cases or controversies. See *Sibron* v. *New York*, 392 U. S. 40, 57 (1968); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States §§ 270–271 (R. Wolfson & P. Kurland ed. 1951); Diamond, Federal Jurisdiction To Decide Moot Cases, 94 U. Pa. L. Rev. 125 (1946); Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955).

[8] Petitioners do not press their claim that respondent McCormack should be required to administer the oath to Powell, apparently conceding that the seating of Powell has rendered this specific claim moot. Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests. See *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 353 (1922). Respondents also argue that the seating of petitioner Powell has mooted the claims of Powell's constituents. Since this case will be remanded, that issue as well as petitioners' other claims can be disposed of by the court below.

tory Judgments 35–37 (2d ed. 1941). Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86–94 (1947); 6A J. Moore, Federal Practice ¶ 57.13 (2d ed. 1966). Despite Powell's obvious and continuing interest in his withheld salary, respondents insist that *Alejandrino* v. *Quezon*, 271 U. S. 528 (1926), leaves us no choice but to dismiss this litigation as moot. Alejandrino, a duly appointed Senator of the Philippine Islands, was suspended for one year by a resolution of the Philippine Senate and deprived of all "prerogatives, privileges and emoluments" for the period of his suspension. The Supreme Court of the Philippines refused to enjoin the suspension. By the time the case reached this Court, the suspension had expired and the Court dismissed as moot Alejandrino's request that the suspension be enjoined. Then, *sua sponte*,[9] the Court considered whether the possibility that Alejandrino was entitled to back salary required it "to retain the case for the purpose of determining whether he [Alejandrino] may not have a mandamus for this purpose." *Id.*, at 533. Characterizing the issue of Alejandrino's salary as a "mere incident" to his claim that the suspension was improper, the Court noted that he had not briefed the salary issue and that his request for mandamus did not set out with sufficient clarity the official or set of officials against whom the mandamus should issue. *Id.*, at 533–534. The Court therefore refused to treat the salary claim and dismissed the entire action as moot.

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[9] Alejandrino's brief did not consider either the possibility that his request for injunctive relief had become moot or whether his salary claim required that the Court treat the propriety of his suspension. No brief was filed on behalf of respondents.

Respondents believe that Powell's salary claim is also a "mere incident" to his insistence that he was unconstitutionally excluded so that we should likewise dismiss this entire action as moot. This argument fails to grasp that the reason for the dismissal in *Alejandrino* was not that Alejandrino's deprivation of salary was insufficiently substantial to prevent the case from becoming moot, but rather that his failure to plead sufficient facts to establish his mandamus claim made it impossible for any court to resolve the mandamus request.[10] By contrast, petitioners' complaint names the official responsible for the payment of congressional salaries and asks for both mandamus and an injunction against that official.[11]

Futhermore, even if respondents are correct that petitioners' averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested, a form of relief not available

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[10] After discussing the insufficiency of Alejandrino's averments as to the officer responsible for his salary, the Court stated: "Were that set out, the remedy of the Senator would seem to be by mandamus to compel such official in the discharge of his ministerial duty to pay him the salary due . . . ." 271 U. S., at 534. That the insufficiency of Alejandrino's averments was the reason for dismissal is further substantiated by a later passage: "As we are not able to derive from the petition sufficient information upon which properly to afford such a remedy [mandamus], we must treat the whole cause as moot and act accordingly." *Id.*, at 535.

[11] Paragraph 18b of petitioners' complaint avers that "Leake W. Johnson, as Sergeant-at-Arms of the House" is responsible for and refuses to pay Powell's salary and prays for an injunction restraining the Sergeant at Arms from implementing the House resolution depriving Powell of his salary as well as mandamus to order that the salary be paid.

when *Alejandrino* was decided.[12] A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. See *United Public Workers* v. *Mitchell, supra,* at 93; cf. *United States* v. *California,* 332 U. S. 19, 25–26 (1947). A declaratory judgment can then be used as a predicate to further relief, including an injunction. 28 U. S. C. § 2202; see *Vermont Structural Slate Co.* v. *Tatko Brothers Slate Co.,* 253 F. 2d 29 (C. A. 2d Cir. 1958); *United States Lines Co.* v. *Shaughnessy,* 195 F. 2d 385 (C. A. 2d Cir. 1952). *Alejandrino* stands only for the proposition that, where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot.[13] There is no suggestion that petitioners' averments as to declaratory relief are insufficient and Powell's allegedly unconstitutional deprivation of salary remains unresolved.

Respondents further argue that Powell's "wholly incidental and subordinate" demand for salary is insufficient to prevent this litigation from becoming moot. They suggest that the "primary and principal relief" sought was the seating of petitioner Powell in the 90th Congress rendering his presumably secondary claims not worthy of judicial consideration. *Bond* v. *Floyd,* 385 U. S. 116 (1966), rejects respondents' theory that the mootness of a "primary" claim requires a conclusion that all "secondary" claims are moot. At the *Bond* oral argument it was suggested that the expiration of the session of the Georgia Legislature which excluded Bond had rendered

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[12] Federal courts were first empowered to grant declaratory judgments in 1934, see 48 Stat. 955, 10 years after Alejandrino filed his complaint.

[13] It was expressly stated in *Alejandrino* that a properly pleaded mandamus action could be brought, 271 U. S., at 535, impliedly holding that Alejandrino's salary claim had not been mooted by the expiration of his suspension.

the case moot. We replied: "The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded." 385 U. S., at 128, n. 4. *Bond* is not controlling, argue respondents, because the legislative term from which Bond was excluded did not end until December 31, 1966,[14] and our decision was rendered December 5; further, when *Bond* was decided, Bond had not as yet been seated while in this case Powell has been.[15] Respondents do not tell us, however, why these factual distinctions create a legally significant difference between *Bond* and this case. We relied in *Bond* on the outstanding salary claim, not the facts respondents stress, to hold that the case was not moot.

Finally, respondents seem to argue that Powell's proper action to recover salary is a suit in the Court of Claims, so that, having brought the wrong action, a dismissal for mootness is appropriate. The short answer to this argument is that it confuses mootness with whether Powell has established a right to recover against the Sergeant at Arms, a question which it is inappropriate to treat at this stage of the litigation.[16]

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[14] Respondents do not supply any substantiation for their assertion that the term of the Georgia Legislature did not expire until December 31. Presumably, they base their statement upon Ga. Code Ann. §§ 2–1601, 2–1603 (Supp. 1968).

[15] Respondents also suggest that *Bond* is not applicable because the parties in *Bond* had stipulated that Bond would be entitled to back salary if his constitutional challenges were accepted, while there is no stipulation in this case. However, if the claim in *Bond* was moot, a stipulation by the parties could not confer jurisdiction. See, *e. g.*, *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 314 (1893).

[16] Since the court below disposed of this case on grounds of justiciability, it did not pass upon whether Powell had brought an appropriate action to recover his salary. Where a court of

III.

Speech or Debate Clause.

Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, § 6,[17] is an absolute bar to petitioners' action. This Court has on four prior occasions—*Dombrowski* v. *Eastland*, 387 U. S. 82 (1967); *United States* v. *Johnson*, 383 U. S. 169 (1966); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); and *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881)—been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicial review by the Speech or Debate Clause. Both parties insist that their respective positions find support in these cases and tender for decision three distinct issues: (1) whether respondents in participating in the exclusion of petitioner Powell were "acting in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, *supra*, at 376; (2) assuming that respondents were so acting, whether the fact that petitioners seek neither damages from any of the respondents nor a criminal prosecution lifts the bar of the clause; [18] and (3) even if this

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appeals has misconceived the applicable law and therefore failed to pass upon a question, our general practice has been to remand the case to that court for consideration of the remaining issues. See, *e. g.*, *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 704 (1967); *Bank of America National Trust & Savings Assn.* v. *Parnell*, 352 U. S. 29, 34 (1956). We believe that such action is appropriate for resolution of whether Powell in this litigation is entitled to mandamus against the Sergeant at Arms for salary withheld pursuant to the House resolution.

[17] Article I, § 6, provides: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

[18] Petitioners ask the Court to draw a distinction between declaratory relief sought against members of Congress and either an action for damages or a criminal prosecution, emphasizing that our four previous cases concerned "criminal or civil sanctions of a deterrent nature." Brief for Petitioners 171.

action may not be maintained against a Congressman, whether those respondents who are merely employees of the House may plead the bar of the clause. We find it necessary to treat only the last of these issues.

The Speech or Debate Clause, adopted by the Constitutional Convention without debate or opposition,[19] finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.[20] Drawing upon this history, we concluded in *United States* v. *Johnson, supra,* at 181, that the purpose of this clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary." Although the clause sprang from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament,[21] we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson, supra,* at 204. Furthermore, the clause not only provides a

[19] See 5 Debates on the Federal Constitution 406 (J. Elliot ed. 1876); 2 Records of the Federal Convention of 1787, p. 246 (M. Farrand rev. ed. 1966) (hereinafter cited as Farrand).

[20] The English Bill of Rights contained a provision substantially identical to Art. I, § 6: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2. The English and American colonial history is traced in some detail in Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk U. L. Rev. 1, 3–16 (1968), and Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960, 961–966 (1951).

[21] *United States* v. *Johnson,* 383 U. S. 169, 182–183 (1966).

defense on the merits but also protects a legislator from the burden of defending himself. *Dombrowski* v. *Eastland, supra,* at 85; see *Tenney* v. *Brandhove, supra,* at 377.

Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation. Thus, in *Tenney* v. *Brandhove, supra,* at 373, the Court quoted the writings of James Wilson as illuminating the reason for legislative immunity: "In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." [22]

Legislative immunity does not, of course, bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see *Marbury* v. *Madison,* 1 Cranch 137, and expressly in *Kilbourn* v. *Thompson,* the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in *Kilbourn* was the constitutionality of a House Resolution ordering the arrest and imprisonment of a recalcitrant witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment

[22] 1 The Works of James Wilson 421 (R. McCloskey ed. 1967).

pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest.

The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland*[23] the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts. Despite the fact that petitioners brought this suit against several House employees—the Sergeant at Arms, the Doorkeeper and the Clerk—as well as several Congressmen, respondents argue that *Kilbourn* and *Dombrowski* are distinguishable. Conceding that in *Kilbourn* the presence of the Sergeant at Arms and in *Dombrowski* the presence of a congressional subcommittee counsel as defendants in the litigation allowed judicial review of the challenged congressional action, respondents urge that both cases concerned an affirmative act performed by the employee outside the House having a direct effect upon a private citizen. Here, they continue, the relief sought relates to actions taken by House agents solely within the House. Alternatively, respondents insist that Kilbourn and Dombrowski prayed for damages while petitioner Powell asks that the Sergeant at Arms disburse funds, an assertedly greater interference with the legislative process. We reject the proffered distinctions.

That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision.

[23] In *Dombrowski* $500,000 in damages was sought against a Senator and the chief counsel of a Senate Subcommittee chaired by that Senator. Record in No. 118, O. T. 1966, pp. 10–11. We affirmed the grant of summary judgment as to the Senator but reversed as to subcommittee counsel.

Kilbourn decisively settles this question, since the Sergeant at Arms was held liable for false imprisonment even though he did nothing more than execute the House Resolution that Kilbourn be arrested and imprisoned.[24] Respondents' suggestions thus ask us to distinguish between affirmative acts of House employees and situations in which the House orders its employees not to act or between actions for damages and claims for salary. We can find no basis in either the history of the Speech or Debate Clause or our cases for either distinction. The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than he would be by a lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because the claim is for salary rather than damages, or because the litigation questions action taken by the employee within rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves.[25] In *Kilbourn* and *Dombrowski*

[24] The Court in *Kilbourn* quoted extensively from *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 114, 112 Eng. Rep. 1112, 1156 (Q. B. 1839), to refute the assertion that House agents were immune because they were executing orders of the House: "[I]f the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer." Kilbourn eventually recovered $20,000 against Thompson. See *Kilbourn* v. *Thompson*, MacArth. & M. 401, 432 (Sup. Ct. D. C. 1883).

[25] A Congressman is not by virtue of the Speech or Debate Clause absolved of the responsibility of filing a motion to dismiss and the

we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, though this action may be dismissed against the Congressmen petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell.[26] As was said in *Kilbourn*, in language which time has not dimmed:

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U. S., at 199.

IV.

Exclusion or Expulsion.

The resolution excluding petitioner Powell was adopted by a vote in excess of two-thirds of the 434 Members of

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trial court must still determine the applicability of the clause to plaintiff's action. See *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951).

[26] Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available. Cf. *Kilbourn* v. *Thompson*, 103 U. S. 168, 204–205 (1881).

Congress—307 to 116. 113 Cong. Rec. 5037–5038. Article I, § 5, grants the House authority to expel a member "with the Concurrence of two thirds." [27] Respondents assert that the House may expel a member for any reason whatsoever and that, since a two-thirds vote was obtained, the procedure by which Powell was denied his seat in the 90th Congress should be regarded as an expulsion, not an exclusion. Cautioning us not to exalt form over substance, respondents quote from the concurring opinion of Judge McGowan in the court below:

> "Appellant Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues . . . to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a ⅔ vote was forthcoming. It was. Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." 129 U. S. App. D. C., at 383–384, 395 F. 2d, at 606–607.

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[27] Powell was "excluded" from the 90th Congress, *i. e.*, he was not administered the oath of office and was prevented from taking his seat. If he had been allowed to take the oath and subsequently had been required to surrender his seat, the House's action would have constituted an "expulsion." Since we conclude that Powell was excluded from the 90th Congress, we express no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated.

Although respondents repeatedly urge this Court not to speculate as to the reasons for Powell's exclusion, their attempt to equate exclusion with expulsion would require a similar speculation that the House would have voted to expel Powell had it been faced with that question. Powell had not been seated at the time House Resolution No. 278 was debated and passed. After a motion to bring the Select Committee's proposed resolution to an immediate vote had been defeated, an amendment was offered which mandated Powell's exclusion.[28] Mr. Celler, chairman of the Select Committee, then posed a parliamentary inquiry to determine whether a two-thirds vote was necessary to pass the resolution if so amended "in the sense that it might amount to an expulsion." 113 Cong. Rec. 5020. The Speaker replied that "action by a majority vote would be in accordance with the rules." *Ibid.* Had the amendment been regarded as an attempt to expel Powell, a two-thirds vote would have been constitutionally required. The Speaker ruled that the House was voting to exclude Powell, and we will not speculate what the result might have been if Powell had been seated and expulsion proceedings subsequently instituted.

Nor is the distinction between exclusion and expulsion merely one of form. The misconduct for which Powell was charged occurred prior to the convening of the 90th Congress. On several occasions the House has debated whether a member can be expelled for actions taken during a prior Congress and the House's own manual of procedure applicable in the 90th Congress states that "both Houses have distrusted their power to punish in such cases." Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., 25 (1967);

[28] House Resolution No. 278, as amended and adopted, provided: "That said Adam Clayton Powell . . . be and the same hereby is *excluded* from membership in the 90th Congress . . . ." 113 Cong. Rec. 5020. (Emphasis added.)

see G. Galloway, History of the House of Representatives 32 (1961). The House rules manual reflects positions taken by prior Congresses. For example, the report of the Select Committee appointed to consider the expulsion of John W. Langley states unequivocally that the House will not expel a member for misconduct committed during an earlier Congress:

> "[I]t must be said that with practical uniformity the precedents in such cases are to the effect that the House will not expel a Member for reprehensible action prior to his election as a Member, not even for conviction for an offense. On May 23, 1884, Speaker Carlisle decided that the House had no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected a Member, and added, 'That has been so frequently decided in the House that it is no longer a matter of dispute.'" H. R. Rep. No. 30, 69th Cong., 1st Sess., 1–2 (1925).[29]

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[29] Other Congresses have expressed an identical view. The Report of the Judiciary Committee concerning the proposed expulsion of William S. King and John G. Schumaker informed the House:

"Your committee are of opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is purely a legislative body, and entirely unsuited for the trial of crimes. The fifth section of the first article of the Constitution authorizes 'each house to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.' This power is evidently given to enable each house to exercise its constitutional function of legislation unobstructed. It cannot vest in Congress a jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone." H. R. Rep. No. 815, 44th Cong., 1st Sess., 2 (1876).

See also 15 Cong. Rec. 4434 (1884) (ruling of the Speaker); H. R. Rep. No. 81, 42d Cong., 3d Sess., 8 (1873) (expulsion of James Brooks and Oakes Ames); H. R. Rep. No. 179, 35th Cong., 1st Sess., 4–5 (1858) (expulsion of Orsamus B. Matteson).

Members of the House having expressed a belief that such strictures apply to its own power to expel, we will not assume that two-thirds of its members would have expelled Powell for his prior conduct had the Speaker announced that House Resolution No. 278 was for expulsion rather than exclusion.[30]

Finally, the proceedings which culminated in Powell's exclusion cast considerable doubt upon respondents' assumption that the two-thirds vote necessary to expel would have been mustered. These proceedings have been succinctly described by Congressman Eckhardt:

> "The House voted 202 votes for the previous question [31] leading toward the adoption of the [Select] Committee report. It voted 222 votes against the previous question, opening the floor for the Curtis Amendment which ultimately excluded Powell.

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[30] We express no view as to whether such a ruling would have been proper. A further distinction between expulsion and exclusion inheres in the fact that a member whose expulsion is contemplated may as a matter of right address the House and participate fully in debate while a member-elect apparently does not have a similar right. In prior cases the member whose expulsion was under debate has been allowed to make a long and often impassioned defense. See Cong. Globe, 42d Cong., 3d Sess., 1723 (1873) (expulsion of Oakes Ames); Cong. Globe, 41st Cong., 2d Sess., 1524–1525, 1544 (1870) (expulsion of B. F. Whittemore); Cong. Globe, 34th Cong., 3d Sess., 925–926 (1857) (expulsion of William A. Gilbert); Cong. Globe, 34th Cong., 3d Sess., 947–951 (1857) (expulsion of William W. Welch); 9 Annals of Cong. 2966 (1799) (expulsion of Matthew Lyon). On at least one occasion the member has been allowed to cross-examine other members during the expulsion debate. 2 A. Hinds, Precedents of the House of Representatives § 1643 (1907).

[31] A motion for the previous question is a debate-limiting device which, when carried, has the effect of terminating debate and of forcing a vote on the subject at hand. See Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., §§ 804–809 (1967); Cannon's Procedure in the House of Representatives, H. R. Doc. No. 610, 87th Cong., 2d Sess., 277–281 (1963).

> "Upon adoption of the Curtis Amendment, the vote again fell short of two-thirds, being 248 yeas to 176 nays. Only on the final vote, adopting the Resolution as amended, was more than a two-thirds vote obtained, the vote being 307 yeas to 116 nays. On this last vote, as a practical matter, members who would not have denied Powell a seat if they were given the choice to punish him had to cast an aye vote or else record themselves as opposed to the only punishment that was likely to come before the House. Had the matter come up through the processes of expulsion, it appears that the two-thirds vote would have failed, and then members would have been able to apply a lesser penalty." [32]

We need express no opinion as to the accuracy of Congressman Eckhardt's prediction that expulsion proceedings would have produced a different result. However, the House's own views of the extent of its power to expel

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[32] Eckhardt, The Adam Clayton Powell Case, 45 Texas L. Rev. 1205, 1209 (1967). The views of Congressman Eckhardt were echoed during the exclusion proceedings. Congressman Cleveland stated that, although he voted in favor of and supported the Select Committee's recommendation, if the exclusion amendment received a favorable vote on the motion for the previous question, then he would support the amendment "on final passage." 113 Cong. Rec. 5031. Congressman Gubser was even more explicit:

"I shall vote against the previous question on the Curtis amendment simply because I believe future and perfecting amendments should be allowed. But if the previous question is ordered, then I will be placed on the horns of an impossible dilemma.

"Mr. Speaker, I want to expel Adam Clayton Powell, by seating him first, but that will not be my choice when the Curtis amendment is before us. I will be forced to vote for exclusion, about which I have great constitutional doubts, or to vote for no punishment at all. Given this raw and isolated issue, the only alternative I can follow is to vote for the Curtis amendment. I shall do so, Mr. Speaker, with great reservation." *Ibid.*

combined with the Congressman's analysis counsel that exclusion and expulsion are not fungible proceedings. The Speaker ruled that House Resolution No. 278 contemplated an exclusion proceeding. We must reject respondents' suggestion that we overrule the Speaker and hold that, although the House manifested an intent to exclude Powell, its action should be tested by whatever standards may govern an expulsion.

V.

Subject Matter Jurisdiction.

As we pointed out in *Baker* v. *Carr*, 369 U. S. 186, 198 (1962), there is a significant difference between determining whether a federal court has "jurisdiction of the subject matter" and determining whether a cause over which a court has subject matter jurisdiction is "justiciable." The District Court determined that "to decide this case on the merits . . . would constitute a clear violation of the doctrine of separation of powers" and then dismissed the complaint "for want of jurisdiction of the subject matter." *Powell* v. *McCormack*, 266 F. Supp. 354, 359, 360 (D. C. D. C. 1967). However, as the Court of Appeals correctly recognized, the doctrine of separation of powers is more properly considered in determining whether the case is "justiciable." We agree with the unanimous conclusion of the Court of Appeals that the District Court had jurisdiction over the subject matter of this case.[33] However, for reasons set forth in Part VI, *infra*, we disagree with the Court of Appeals' conclusion that this case is not justiciable.

In *Baker* v. *Carr*, *supra*, we noted that a federal district court lacks jurisdiction over the subject matter (1) if the

[33] Although each judge of the panel wrote a separate opinion, all were clear in stating that the District Court possessed subject matter jurisdiction. *Powell* v. *McCormack*, 129 U. S. App. D. C. 354, 368, 384, 385, 395 F. 2d 577, 591, 607, 608 (1968).

cause does not "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Art. III); or (2) if it is not a "case or controversy" within the meaning of that phrase in Art. III; or (3) if the cause is not one described by any jurisdictional statute. And, as in *Baker* v. *Carr*, *supra*, our determination (see Part VI, B (1) *infra*) that this cause presents no nonjusticiable "political question" disposes of respondents' contentions [34] that this cause is not a "case or controversy." [35]

Respondents first contend that this is not a case "arising under" the Constitution within the meaning of Art. III. They emphasize that Art. I, § 5, assigns to each House of Congress the power to judge the elections and qualifications of its own members and to punish its members for disorderly behavior. Respondents also note that under Art. I, § 3, the Senate has the "sole power" to try all impeachments. Respondents argue that these delegations (to "judge," to "punish," and to "try") to the Legislative Branch are explicit grants of "judicial power" to the Congress and constitute specific exceptions

[34] We have determined that the case is not moot. See Part II, *supra*.

[35] Indeed, the thrust of respondents' argument on this jurisdictional issue is similar to their contentions that this case presents a nonjusticiable "political question." They urge that it would have been "unthinkable" to the Framers of the Constitution for courts to review the decision of a legislature to exclude a member. However, we have previously determined that a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat an elected representative constitutes a "case or controversy" over which federal courts have jurisdiction. See *Bond* v. *Floyd*, 385 U. S. 116, 131 (1966). To the extent the expectations of the Framers are discernible and relevant to this case, they must therefore relate to the special problem of review by *federal* courts of actions of the *federal* legislature. This is of course a problem of separation of powers and is to be considered in determining justiciability. See *Baker* v. *Carr*, 369 U. S. 186, 210 (1962).

to the general mandate of Art. III that the "judicial power" shall be vested in the federal courts. Thus, respondents maintain, the "power conferred on the courts by article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed." [36]

We reject this contention. Article III, § 1, provides that the "judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish." Further, § 2 mandates that the "judicial Power shall extend to all Cases . . . arising under this Constitution. . . ." It has long been held that a suit "arises under" the Constitution if a petitioner's claim "will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another." [37] *Bell* v. *Hood,* 327 U. S. 678, 685 (1946). See *King County* v. *Seattle School District No. 1,* 263 U. S. 361, 363–364 (1923). Cf. *Osborn* v. *Bank of the United States,* 9 Wheat. 738 (1824). See generally C. Wright, Federal Courts 48–52 (1963). Thus, this case clearly is one "arising under" the Constitution as the Court has interpreted that phrase. Any bar to federal courts reviewing the judgments made by the House or Senate in excluding a member arises from the allocation of powers between the two branches of the Federal Government (a question of justiciability), and not from the petitioners' failure to state a claim based on federal law.

Respondents next contend that the Court of Appeals erred in ruling that petitioners' suit is authorized by a jurisdictional statute, *i. e.,* 28 U. S. C. § 1331 (a).

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[36] Brief for Respondents 39.

[37] Petitioners' complaint is predicated, *inter alia,* on several sections of Article I, Article III, and several amendments to the Constitution. Respondents do not challenge the substantiality of these claims.

Section 1331 (a) provides that district courts shall have jurisdiction in "all civil actions wherein the matter in controversy . . . arises under the Constitution . . . ." Respondents urge that even though a case may "arise under the Constitution" for purposes of Art. III, it does not necessarily "arise under the Constitution" for purposes of § 1331 (a). Although they recognize there is little legislative history concerning the enactment of § 1331 (a), respondents argue that the history of the period when the section was first enacted indicates that the drafters did not intend to include suits questioning the exclusion of Congressmen in this grant of "federal question" jurisdiction.

Respondents claim that the passage of the Force Act [38] in 1870 lends support to their interpretation of the intended scope of § 1331. The Force Act gives the district courts jurisdiction over "any civil action to recover possession of any office . . . wherein it appears that the sole question . . . arises out of denial of the right to vote . . . on account of race, color or previous condition of servitude." However, the Act specifically excludes suits concerning the office of Congressman. Respondents maintain that this exclusion demonstrates Congress' intention to prohibit federal courts from entertaining suits regarding the seating of Congressmen.

We have noted that the grant of jurisdiction in § 1331 (a), while made in the language used in Art. III, is not in all respects co-extensive with the potential for federal jurisdiction found in Art. III. See *Zwickler* v. *Koota*, 389 U. S. 241, 246 n. 8 (1967). Nevertheless, it has generally been recognized that the intent of the drafters was to provide a broad jurisdictional grant to the federal courts. See, *e. g.*, Mishkin, The Federal "Question" in the District Courts, 53 Col. L.

[38] Act of May 31, 1870, § 23, 16 Stat. 146. The statute is now 28 U. S. C. § 1344.

Rev. 157, 160 (1953); Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 644–645 (1942). And, as noted above, the resolution of this case depends directly on construction of the Constitution. The Court has consistently held such suits are authorized by the statute. *Bell* v. *Hood, supra; King County* v. *Seattle School District No. 1, supra.* See, *e. g., Gully* v. *First Nat. Bank in Meridian,* 299 U. S. 109, 112 (1936); *The Fair* v. *Kohler Die & Specialty Co.,* 228 U. S. 22, 25 (1913).

As respondents recognize, there is nothing in the wording or legislative history of § 1331 or in the decisions of this Court which would indicate that there is any basis for the interpretation they would give that section. Nor do we think the passage of the Force Act indicates that § 1331 does not confer jurisdiction in this case. The Force Act is limited to election challenges where a denial of the right to vote in violation of the Fifteenth Amendment is alleged. See 28 U. S. C. § 1344. Further, the Act was passed five years before the original version of § 1331 was enacted. While it might be inferred that Congress intended to give each House the exclusive power to decide congressional election challenges,[39] there is absolutely no indication that the passage of this Act evidences an intention to impose other restrictions on the broad grant of jurisdiction in § 1331.

VI.

Justiciability.

Having concluded that the Court of Appeals correctly ruled that the District Court had jurisdiction over the subject matter, we turn to the question whether the case is justiciable. Two determinations must be made in this regard. First, we must decide whether the claim

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[39] See Cong. Globe, 41st Cong., 2d Sess., 3872 (1870).

presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a "political question"—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution.

A. *General Considerations.*

In deciding generally whether a claim is justiciable, a court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker* v. *Carr, supra,* at 198. Respondents do not seriously contend that the duty asserted and its alleged breach cannot be judicially determined. If petitioners are correct, the House had a duty to seat Powell once it determined he met the standing requirements set forth in the Constitution. It is undisputed that he met those requirements and that he was nevertheless excluded.

Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to "mold effective relief for resolving this case." Respondents emphasize that petitioners asked for coercive relief against the officers of the House, and, they contend, federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts. Respondents rely primarily on the Speech or Debate Clause to support this contention.

We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued. The Declaratory Judgment Act, 28 U. S. C. § 2201, provides that a district court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." The

availability of declaratory relief depends on whether there is a live dispute between the parties, *Golden* v. *Zwickler,* 394 U. S. 103 (1969), and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. See *United Public Workers* v. *Mitchell,* 330 U. S. 75, 93 (1947); 6A J. Moore, Federal Practice ¶ 57.08 [3] (2d ed. 1966); cf. *United States* v. *California,* 332 U. S. 19, 25–26 (1947). We thus conclude that in terms of the general criteria of justiciability, this case is justiciable.

B. *Political Question Doctrine.*

1. Textually Demonstrable Constitutional Commitment.

Respondents maintain that even if this case is otherwise justiciable, it presents only a political question. It is well established that the federal courts will not adjudicate political questions. See, *e. g., Coleman* v. *Miller,* 307 U. S. 433 (1939); *Oetjen* v. *Central Leather Co.,* 246 U. S. 297 (1918). In *Baker* v. *Carr, supra,* we noted that political questions are not justiciable primarily because of the separation of powers within the Federal Government. After reviewing our decisions in this area, we concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality

of embarrassment from multifarious pronouncements by various departments on one question." 369 U. S., at 217.

Respondents' first contention is that this case presents a political question because under Art. I, § 5, there has been a "textually demonstrable constitutional commitment" to the House of the "adjudicatory power" to determine Powell's qualifications. Thus it is argued that the House, and the House alone, has power to determine who is qualified to be a member.[40]

In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, § 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review. Re-

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[40] Respondents rely on *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597 (1929). *Barry* involved the power of the Senate to issue an arrest warrant to summon a witness to give testimony concerning a senatorial election. The Court ruled that issuance of the warrant was constitutional, relying on the power of the Senate under Art. I, § 5, to be the judge of the elections of its members. Respondents particularly rely on language the Court used in discussing the power conferred by Art. I, § 5. The Court noted that under § 5 the Senate could "render a judgment which is beyond the authority of any other tribunal to review." *Id.*, at 613.

Barry provides no support for respondents' argument that this case is not justiciable, however. First, in *Barry* the Court reached the merits of the controversy, thus indicating that actions allegedly taken pursuant to Art. I, § 5, are not automatically immune from judicial review. Second, the quoted statement is dictum; and, later in the same opinion, the Court noted that the Senate may exercise its power subject "to the restraints imposed by or found in the implications of the Constitution." *Id.*, at 614. Third, of course, the statement in *Barry* leaves open the particular question that must first be resolved in this case: the existence and scope of the textual commitment to the House to judge the qualifications of members.

spondents maintain that the House has broad power under § 5, and, they argue, the House may determine which are the qualifications necessary for membership. On the other hand, petitioners allege that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualifications expressly prescribed by the Constitution.

If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution,[41] further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are

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[41] In addition to the three qualifications set forth in Art. I, § 2, Art. I, § 3, cl. 7, authorizes the disqualification of any person convicted in an impeachment proceeding from "any Office of honor, Trust or Profit under the United States"; Art. I, § 6, cl. 2, provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office"; and § 3 of the 14th Amendment disqualifies any person "who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." It has been argued that each of these provisions, as well as the Guarantee Clause of Article IV and the oath requirement of Art. VI, cl. 3, is no less a "qualification" within the meaning of Art. I, § 5, than those set forth in Art. I, § 2. Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 J. Pub. L. 103, 111–115 (1968). We need not reach this question, however, since both sides agree that Powell was not ineligible under any of these provisions.

"inextricable from the case at bar."[42] *Baker* v. *Carr*, *supra*, at 217.

In other words, whether there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" of government and what is the scope of such commitment are questions we must resolve for the first time in this case.[43] For, as we pointed out in *Baker* v. *Carr*, *supra*, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Id.*, at 211.

In order to determine the scope of any "textual commitment" under Art. I, § 5, we necessarily must determine the meaning of the phrase to "be the Judge of the Qualifications of its own Members." Petitioners argue that the records of the debates during the Constitutional Convention; available commentary from the post-Convention, pre-ratification period; and early congressional applications of Art. I, § 5, support their construction of the section. Respondents insist, however, that a careful examination of the pre-Convention practices of the English Parliament and American colonial assemblies demonstrates that by 1787, a legislature's power to judge the qualifications of its members was generally under-

[42] Consistent with this interpretation, federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution.

[43] Indeed, the force of respondents' other arguments that this case presents a political question depends in great measure on the resolution of the textual commitment question. See Part VI, B (2), *infra*.

stood to encompass exclusion or expulsion on the ground that an individual's character or past conduct rendered him unfit to serve. When the Constitution and the debates over its adoption are thus viewed in historical perspective, argue respondents, it becomes clear that the "qualifications" expressly set forth in the Constitution were not meant to limit the long-recognized legislative power to exclude or expel at will, but merely to establish "standing incapacities," which could be altered only by a constitutional amendment. Our examination of the relevant historical materials leads us to the conclusion that petitioners are correct and that the Constitution leaves the House [44] without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.

a. The Pre-Convention Precedents.

Since our rejection of respondents' interpretation of § 5 results in significant measure from a disagreement with their historical analysis, we must consider the relevant historical antecedents in considerable detail. As do respondents, we begin with the English and colonial precedents.

The earliest English exclusion precedent appears to be a declaration by the House of Commons in 1553 "that Alex. Nowell, being Prebendary [*i. e.*, a clergyman] in Westminster, and thereby having voice in the Convocation House, cannot be a member of this House . . . ." J. Tanner, Tudor Constitutional Documents: A. D. 1485–1603, p. 596 (2d ed. 1930). This decision, however, was

[44] Since Art. I, § 5, cl. 1, applies to both Houses of Congress, the scope of the Senate's power to judge the qualifications of its members necessarily is identical to the scope of the House's power, with the exception, of course, that Art. I, § 3, cl. 3, establishes different age and citizenship requirements for membership in the Senate.

consistent with a long-established tradition that clergy who participated in their own representative assemblies or convocations were ineligible for membership in the House of Commons.[45] See 1 E. Porritt, The Unreformed House of Commons 125 (1963); T. Taswell-Langmead's English Constitutional History 142–143 (11th ed. T. Plucknett 1960). The traditional ineligibility of clergymen was recognized as a standing incapacity.[46] See 1 W. Blackstone's Commentaries *175. Nowell's exclusion, therefore, is irrelevant to the present case, for petitioners concede—and we agree—that if Powell had not met one of the standing qualifications set forth in the Constitution, he could have been excluded under Art. I, § 5. The earliest colonial exclusions also fail to support respondents' theory.[47]

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[45] Since the reign of Henry IV (1399–1413), no clergyman had sat in the House of Commons. 1 E. Porritt, The Unreformed House of Commons 125 (1963).

[46] Because the British do not have a written constitution, standing incapacities or disqualifications for membership in Parliament are derived from "the custom and law of parliament." 1 W. Blackstone's Commentaries *162; see *id.*, at *175. The groups thus disqualified as of 1770 included aliens; minors; judges who sat in the House of Lords; clergy who were represented in their own convocation; persons "attainted of treason or felony"; sheriffs, mayors, and bailiffs as representatives for their own jurisdictions; and certain taxing officials and officers of the Crown. *Id.*, at *175–176. Not until the exclusion of John Wilkes, discussed *infra*, did Blackstone subscribe to the theory that, in addition, the Commons could declare ineligible an individual "in particular [unspecified] circumstances . . . for that parliament" if it deemed him unfit to serve on grounds not encompassed by the recognized standing incapacities. As we explain, *infra*, this position was subsequently repudiated by the House in 1782. A Clerk of the House of Commons later referred to cases in which this theory was relied upon "as examples of an excess of . . . jurisdiction by the Commons; for one house of Parliament cannot create a disability unknown to the law." T. May's Parliamentary Practice 67 (13th ed. T. Webster 1924).

[47] In 1619, the Virginia House of Burgesses challenged the eligibility of certain delegates on the ground that they did not hold their

Respondents' remaining 16th and 17th century English precedents all are cases of expulsion, although some were for misdeeds not encompassed within recognized standing incapacities existing either at the time of the expulsions or at the time the Constitution was drafted in 1787.[48] Although these early expulsion orders occasionally contained statements suggesting that the individual expelled was thereafter ineligible for re-election, at least for the duration of the Parliament from which he was expelled,[49]

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plantations under proper patents from the Virginia Company in England. See generally 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3783–3810 (F. Thorpe ed. 1909) (hereinafter cited as Thorpe). One of them, a Captain Warde, was admitted on condition that he obtain the necessary patent. The others, representatives from Martin's Brandon plantation, were excluded on the ground that the owner of the plantation had claimed that his patent exempted him from the colony's laws. See Journals of the House of Burgesses of Virginia: 1619–1658/59, pp. 4–5 (1915); M. Clarke, Parliamentary Privilege in the American Colonies 133–134 (1943). The questions presented by these two cases, therefore, seem to be jurisdictional in nature; that is, an attempt was made to gain representation for plantations over which the assembly may have had no power to act. Thus viewed these cases are analogous to the exclusions for failure to comply with standing qualifications. They certainly are not precedents which support the view that a legislative body could exclude members for mere character defects or prior misconduct disapproved by the assembly. See generally Clarke, *supra*, at 132–204; J. Greene, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies: 1689–1776, pp. 171–204 (1963).

[48] For example, in 1585 the Commons expelled a Doctor Parry for unspecified misbehavior. A Compleat Journal of the Votes, Speeches and Debates of the House of Lords and House of Commons Throughout the Whole Reign of Queen Elizabeth, of Glorious Memory 352 (S. D'Ewes ed. 1708); and in 1628 Sir Edmund Sawyer was expelled because he had sought to induce a witness to suppress evidence against Sir Edmund in testimony before the House. 1 H. C. Jour. 917.

[49] In expelling Sir Edmund Sawyer in 1628, the Commons declared "him to be unworthy ever to serve as a Member of this House."

there is no indication that any were re-elected and thereafter excluded. Respondents' colonial precedents during this period follow a similar pattern.[50]

Apparently the re-election of an expelled member first occurred in 1712. The House of Commons had expelled Robert Walpole for receiving kickbacks for contracts relating to "foraging the Troops," 17 H. C. Jour. 28, and committed him to the Tower. Nevertheless, two months later he was re-elected. The House thereupon resolved "[t]hat Robert Walpole, Esquire, having been, this Session of Parliament, committed a Prisoner to the *Tower* of *London*, and expelled [from] this House, . . . is, incapable of being elected a Member to serve *in this present Parliament* . . . ." *Id.*, at 128. (Second emphasis added.) A new election was ordered, and Walpole was not re-elected. At least two similar exclusions after an initial expulsion were effected in the American colonies during the first half of the 18th century.[51]

Ibid. Almost identical language was used in the expulsion of H. Benson in 1641. 2 *id.*, at 301. But by 1642, the formula had been changed to "disabled to serve any longer *in this Parliament* as *a Member of this House* . . . ." *Id.*, at 703. (Emphasis added.) By the 18th century it was apparently well established that an expulsion by the House of Commons could last no longer than the duration of the Parliament from which the member was expelled. See 1 W. Blackstone's Commentaries *176.

[50] For example, in 1652, the Virginia House of Burgesses expelled two members for prior conduct disapproved by the assembly, Journals of the House of Burgesses, *supra*, at 85; and in 1683, Rhode Island expelled a member "from acting in this present Assembly" for refusing to answer a court summons. 1 S. Arnold, History of the State of Rhode Island and Providence Plantations 289 (1859). See generally Clarke, *supra*, at 173–204.

[51] In 1726, the Massachusetts House of Representatives excluded Gershom Woodle, who had been expelled on three previous occasions as "unworthy to be a Member." 7 Journals of the House of Representatives of Massachusetts 1726–1727, pp. 4–5, 15, 68–69 (1926). In 1758, North Carolina expelled Francis Brown for perjury. He

Respondents urge that the Walpole case provides strong support for their conclusion that the pre-Convention English and colonial practice was that members-elect could be excluded for their prior misdeeds at the sole discretion of the legislative body to which they had been elected. However, this conclusion overlooks an important limiting characteristic of the Walpole case and of both the colonial exclusion cases on which respondents rely: the excluded member had been previously expelled. Moreover, Walpole was excluded only for the remainder of the Parliament from which he had been expelled. "The theory seems to have been that expulsion lasted as long as the parliament . . . ." Taswell-Langmead, *supra*, at 584, n. 99. Accord, 1 W. Blackstone's Commentaries *176. Thus, Walpole's exclusion justifies only the proposition that an expulsion lasted for the remainder of the particular Parliament, and the expelled member was therefore subject to subsequent exclusion if re-elected prior to the next general election. The two colonial cases arguably support a somewhat broader principle, *i. e.*, that the assembly could permanently expel. Apparently the colonies did not consistently adhere to the theory that an expulsion lasted only until the election of a new assembly. M. Clarke, Parliamentary Privilege in the American Colonies 196–202 (1943).[52] Clearly, however, none of these cases supports respondents' contention that by the 18th century the English Parliament

was re-elected twice in 1760 and excluded on both occasions; however, when he was elected at the 1761 general elections, he was allowed to take his seat. 5 Colonial Records of North Carolina 1057–1058 (1887); 6 *id.*, at 375, 474, 662–663, 672–673 (1888). There may have been similar exclusions of two men elected in 1710 to the New Jersey Assembly. See Clarke, *supra*, at 197–198.

[52] Significantly, the occasional assumption of this broader expulsion power did not go unchallenged, Clarke, *supra*, at 196–202; and it was not supported by the only parliamentary precedent, the Walpole case.

and colonial assemblies had assumed absolute discretion to exclude any member-elect they deemed unfit to serve. Rather, they seem to demonstrate that a member could be excluded only if he had first been expelled.

Even if these cases could be construed to support respondents' contention, their precedential value was nullified prior to the Constitutional Convention. By 1782, after a long struggle, the arbitrary exercise of the power to exclude was unequivocally repudiated by a House of Commons resolution which ended the most notorious English election dispute of the 18th century—the John Wilkes case. While serving as a member of Parliament in 1763, Wilkes published an attack on a recent peace treaty with France, calling it a product of bribery and condemning the Crown's ministers as " 'the tools of despotism and corruption.' " R. Postgate, That Devil Wilkes 53 (1929). Wilkes and others who were involved with the publication in which the attack appeared were arrested.[53] Prior to Wilkes' trial, the House of Commons expelled him for publishing "a false, scandalous, and seditious libel." 15 Parl. Hist. Eng. 1393 (1764). Wilkes then fled to France and was subsequently sentenced to exile. 9 L. Gipson, The British Empire Before the American Revolution 37 (1956).

Wilkes returned to England in 1768, the same year in which the Parliament from which he had been expelled was dissolved. He was elected to the next Parliament, and he then surrendered himself to the Court of King's Bench. Wilkes was convicted of seditious libel and sentenced to 22 months' imprisonment. The new Parlia-

[53] Pursuant to a general warrant, Wilkes was arrested, his home ransacked, and his private papers seized. In his later election campaigns, Wilkes denounced the use of general warrants, asserting that he was fighting for liberty itself. See 11 L. Gipson, The British Empire Before the American Revolution 213–214 (1965).

ment declared him ineligible for membership and ordered that he be "expelled this House." 16 Parl. Hist. Eng. 545 (1769). Although Wilkes was re-elected to fill the vacant seat three times, each time the same Parliament declared him ineligible and refused to seat him. See 11 Gipson, *supra*, at 207–215.[54]

Wilkes was released from prison in 1770 and was again elected to Parliament in 1774. For the next several years, he unsuccessfully campaigned to have the resolutions expelling him and declaring him incapable of re-election expunged from the record. Finally, in 1782, the House of Commons voted to expunge them, resolving that the prior House actions were "subversive of the rights of the whole body of electors of this kingdom." 22 Parl. Hist. Eng. 1411 (1782).

With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had regulated the qualifications of members to serve in parliament" and those qualifications were "not occasional but fixed." 16 Parl. Hist. Eng. 589, 590 (1769). Certainly English practice did not support, nor had it ever supported, respondents' assertion that the power to judge qualifications was generally understood to encompass the right to exclude members-elect for general misconduct not within standing qualifications. With the repudiation in 1782 of the only two precedents

[54] The issue before the Commons was clear: Could the Commons "put in any disqualification, that is not put in by the law of the land." 1 H. Cavendish's Debates 384 (J. Wright ed. 1841). The affirmative answer was somewhat less than resounding. After Wilkes' third re-election, the motion to seat his opponent carried 197 to 143.

for excluding a member-elect who had been previously expelled,[55] it appears that the House of Commons also repudiated any "control over the eligibility of candidates, except in the administration of the laws which define their [standing] qualifications." T. May's Parliamentary Practice 66 (13th ed. T. Webster 1924). See Taswell-Langmead, *supra*, at 585.[56]

The resolution of the Wilkes case similarly undermined the precedential value of the earlier colonial exclusions, for the principles upon which they had been based were repudiated by the very body the colonial assemblies sought to imitate and whose precedents they generally followed. See Clarke, *supra*, at 54, 59–60, 196. Thus, in 1784 the Council of Censors of the Pennsylvania Assembly[57] denounced the prior expulsion of an unnamed assemblyman, ruling that his expulsion had not been effected in conformity with the recently enacted Pennsylvania Constitution.[58] In the course of its report, the

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[55] The validity of the House's action against Wilkes rested to a large extent on the validity of the Walpole precedent. Taswell-Langmead, *supra*, at 585. Thus, the House of Commons resolution expunging, as subversive to the rights of the whole electorate, the action taken against Wilkes was also a tacit repudiation of the similar action taken against Walpole in 1712.

[56] English law is apparently the same today. See T. May's Parliamentary Practice 105–108 (17th ed. B. Cocks 1964).

[57] The Council of Censors was established by the 1776 Pennsylvania Constitution. It was an elected body that was specifically charged with the duty "to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution." Pa. Const. of 1776, § 47, 5 Thorpe 3091. See Pennsylvania Convention Proceedings: 1776 and 1790, Introduction, p. IV (1825).

[58] In discussing the case, respondents characterize the earlier action as an *exclusion*. The Council of Censors, however, stated that the

Council denounced by name the Parliamentary exclusions of both Walpole and Wilkes, stating that they "reflected dishonor on none but the authors of these violences." Pennsylvania Convention Proceedings: 1776 and 1790, p. 89 (1825).

Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes [59] and his pursuit of the right to be

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general assembly had resolved that the member "is expelled from his seat." Pennsylvania Convention Proceedings, *supra*, at 89. The account of the dissenting committee members suggests that the term expulsion was properly used. They note that in February 1783 the assembly received a letter from the Comptroller General charging the assemblyman with fraud. Not until September 9, 1783, did the assembly vote to expel him. Presumably, he held his seat until that time. But, even if he had been excluded, arguably he was excluded for not meeting a standing incapacity, since the Pennsylvania Constitution of 1776 required assemblymen to be "most noted for wisdom and *virtue*." Pa. Const. of 1776, § 7, 5 Thorpe 3084. (Emphasis added.) In fact, the dissenting members of the Committee argued that the expelled member was ineligible under this very provision. Pennsylvania Convention Proceedings, *supra*, at 89.

Respondents cite one other exclusion during the period between the Declaration of Independence and the Constitutional Convention 11 years later. In 1780 the Virginia Assembly excluded John Breckenridge because he was a minor. Minority, of course, was a traditional standing incapacity, and Charles Warren therefore appears to have been correct in concluding that this exclusion was probably based upon an interpretation of the state constitutional requirement that members must be duly qualified according to law. Va. Const., 7 Thorpe 3816. See C. Warren, The Making of the Constitution 423, n. 1 (1928). Respondents, based upon their misinterpretation of the Pennsylvania case just discussed, criticize Charles Warren for concluding that there had been only one exclusion during this period. Our research, however, has disclosed no other cases.

[59] Wilkes had established a reputation both in England and the Colonies as a champion of free elections, freedom from arbitrary

seated in Parliament became a *cause célèbre* for the colonists. "[T]he cry of 'Wilkes and Liberty' echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press . . . . The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour." 11 Gipson, *supra*, at 222.[60] It is within this historical context that we must examine the Convention debates in 1787, just five years after Wilkes' final victory.

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arrest and seizure, and freedom of the press. See 11 Gipson, *supra*, at 191–222.

[60] See R. Postgate, That Devil Wilkes 171–172, 173–174 (1929). During the House of Commons debates in 1781, a member remarked that expelling Wilkes had been "one of the great causes which had separated . . . [England] from America." 22 Parl. Hist. Eng. 100–101 (1781).

The writings of the pamphleteer "Junius" were widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause. See 3 Dictionary of American History 190 (1940). Letter XVIII of the "Letters of Junius" bitterly attacked the exclusion of Wilkes. This letter, addressed to Blackstone, asserted:

"You cannot but know, sir, that what was Mr. Wilkes's case yesterday may be yours or mine to-morrow, and that, consequently the common right of every subject of the realm is invaded by it. . . . If the expulsion of a member, not under any legal disability, of itself creates in him an incapacity to be elected, I see a ready way marked out, by which the majority may, at any time, remove the honestest and ablest men who happen to be in opposition to them. To say that they will not make this extravagant use of their power would be a language unfit for a man so learned in the laws as you are. By your doctrine, sir, they have the power: and laws, you know, are intended to guard against what men may do, not to trust to what they will do." 1 Letters of Junius, Letter XVIII, p. 118 (1821).

b. Convention Debates.

Relying heavily on Charles Warren's analysis [61] of the Convention debates, petitioners argue that the proceedings manifest the Framers' unequivocal intention to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution. We do not completely agree, for the debates are subject to other interpretations. However, we have concluded that the records of the debates, viewed in the context of the bitter struggle for the right to freely choose representatives which had recently concluded in England and in light of the distinction the Framers made between the power to expel and the power to exclude, indicate that petitioners' ultimate conclusion is correct.

The Convention opened in late May 1787. By the end of July, the delegates adopted, with a minimum of debate, age requirements for membership in both the Senate and the House. The Convention then appointed a Committee of Detail to draft a constitution incorporating these and other resolutions adopted during the preceding months. Two days after the Committee was appointed, George Mason, of Virginia, moved that the Committee consider a clause "'requiring certain qualifications of landed property & citizenship'" and disqualifying from membership in Congress persons who had unsettled accounts or who were indebted to the United States. 2 Farrand 121. A vigorous debate ensued. Charles Pinckney and General Charles C. Pinckney, both of South Carolina, moved to extend these incapacities to both the judicial and executive branches of the new government. But John Dickinson, of Delaware, opposed the inclusion of any statement of qualifications in the Constitution. He argued that it would be "im-

[61] See Warren, *supra*, at 399–426.

possible to make a compleat one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions." *Id.*, at 123.[62] Dickinson's argument was rejected; and, after eliminating the disqualification of debtors and the limitation to "landed" property, the Convention adopted Mason's proposal to instruct the Committee of Detail to draft a property qualification. *Id.*, at 116–117.

The Committee reported in early August, proposing no change in the age requirement; however, it did recommend adding citizenship and residency requirements for membership. After first debating what the precise requirements should be, on August 8, 1787, the delegates unanimously adopted the three qualifications embodied in Art. I, § 2. *Id.*, at 213.[63]

On August 10, the Convention considered the Committee of Detail's proposal that the "Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." *Id.*, at 179. The debate on this proposal discloses much about the views of the Framers on the issue of qualifications. For example, James Madison urged its rejection, stating that the proposal would vest

> "an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature

[62] Dickinson also said that a built-in veneration for wealth would be inconsistent with the republican ideal that merit alone should determine who holds the public trust. 2 Farrand 123.

[63] On August 10, a delegate moved to reconsider the citizenship qualification. The delegate proposed to substitute a three-year requirement for the seven-year requirement already agreed upon. The motion passed. *Id.*, at 251. However, when this proposal was considered on August 13, it was rejected. *Id.*, at 265–266.

> could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction." *Id.*, at 249–250.[64]

Significantly, Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications. The parallel between Madison's arguments and those made in Wilkes' behalf is striking.[65]

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[64] Charles Pinckney proposed that the President, judges, and legislators of the United States be required to swear that they possessed a specified amount of unincumbered property. Benjamin Franklin expressed his strong opposition, observing that "[s]ome of the greatest rogues he was ever acquainted with, were the richest rogues." *Id.*, at 249. He voiced the fear that a property requirement would "discourage the common people from removing to this Country." *Ibid.* Thereafter, "the Motion of Mr. Pinkney [*sic*] was rejected by so general a *no*, that the States were not called." *Ibid.* (Emphasis in original.)

[65] "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution. . . . That the law of the land had regulated the qualifications of members to serve in parliament, and that the freeholders . . . had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws. . . . They are not occasional but fixed: to rule and govern the question as it shall arise; not to start up on a sudden, and shift from side to side, as the caprice of the day or the fluctuation of party shall direct." 16 Parl. Hist. Eng. 589–590 (1769).

In view of what followed Madison's speech, it appears that on this critical day the Framers were facing and then rejecting the possibility that the legislature would have power to usurp the "indisputable right [of the people] to return whom they thought proper" [66] to the legislature. Oliver Ellsworth, of Connecticut, noted that a legislative power to establish property qualifications was exceptional and "dangerous because it would be much more liable to abuse." *Id.*, at 250. Gouverneur Morris then moved to strike "with regard to property" from the Committee's proposal. His intention was "to leave the Legislature entirely at large." *Ibid.* Hugh Williamson, of North Carolina, expressed concern that if a majority of the legislature should happen to be "composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body." *Ibid.*[67] Madison then referred to the British Parliament's assumption of the power to regulate the qualifications of both electors and the elected and noted that "the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." *Ibid.*[68] Shortly thereafter,

[66] *Id.*, at 589.

[67] Wilkes had made essentially the same argument in one of his early attempts to have the resolutions denying him a seat expunged:

"This usurpation, if acquiesced under, would be attended with the most alarming consequences. If you can reject those disagreeable to a majority, and expel whom you please, the House of Commons will be self-created and self-existing. You may expel till you approve, and thus in effect you nominate. The original idea of this House being the representative of the Commons of the realm will be lost." 18 Parl. Hist. Eng. 367 (1775).

[68] Charles Warren concluded that "Madison's reference was undoubtedly to the famous election case of John Wilkes . . . ." Warren, *supra*, at 420, n. 1. It is also possible, however, that he was referring to the Parliamentary Test Act, 30 Car. 2, Stat. 2,

the Convention rejected both Gouverneur Morris' motion and the Committee's proposal. Later the same day, the Convention adopted without debate the provision authorizing each House to be "the judge of the . . . qualifications of its own members." *Id.*, at 254.

One other decision made the same day is very important to determining the meaning of Art. I, § 5. When the delegates reached the Committee of Detail's proposal to empower each House to expel its members, Madison "observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies [one] faction might be dangerously abused." *Id.*, at 254. He therefore moved that "with the concurrence of two-thirds" be inserted. With the exception of one State, whose delegation was divided, the motion was unanimously approved without debate, although Gouverneur Morris noted his opposition. The importance of this decision cannot be over-emphasized. None of the parties to this suit disputes that prior to 1787 the legislative powers to judge qualifications and to expel were exercised by a majority vote. Indeed, without exception, the English and colonial antecedents to Art. I, § 5, cls. 1 and 2, support this conclusion. Thus, the Convention's decision to increase the vote required to expel, because that power was "too important to be exercised by a bare majority," while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.[69]

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c. 1 (1678), which had excluded Catholics as a group from serving in Parliament.

[69] Charles Warren, upon whose interpretation of these events petitioners rely, concluded that the Convention's decision to reject Gouverneur Morris' proposal and the more limited proposal of the Committee of Detail was an implicit adoption of Madison's

Respondents urge, however, that these events must be considered in light of what they regard as a very significant change made in Art. I, § 2, cl. 2, by the Committee of Style. When the Committee of Detail reported the provision to the Convention, it read:

> "Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen." *Id.*, at 178.

However, as finally drafted by the Committee of Style, these qualifications were stated in their present negative form. Respondents note that there are no records of the "deliberations" of the Committee of Style. Nevertheless, they speculate that this particular change was designed to make the provision correspond to the form used by Blackstone in listing the "standing incapacities" for membership in the House of Commons. See 1 W. Blackstone's Commentaries *175–176. Blackstone, who was an apologist for the anti-Wilkes forces in Parlia-

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position that the qualifications of the elected "were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." 2 Farrand 249–250. See Warren, *supra*, at 420–421. Certainly, Warren argued, "[s]uch action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress . . . the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself . . . . For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress." *Id.*, at 421. See 1 J. Story, Commentaries on the Constitution of the United States § 625, at 445 (1873). Although Professor Chafee argued that congressional precedents do not support this construction, he nevertheless stated that forbidding any additions to the qualifications expressed in the Constitution was "the soundest policy." Z. Chafee, Free Speech in the United States 256 (1941).

ment,[70] had added to his Commentaries after Wilkes' exclusion the assertion that individuals who were not ineligible for the Commons under the standing incapacities could still be denied their seat if the Commons deemed them unfit for other reasons.[71] Since Blackstone's Commentaries was widely circulated in the Colonies, respondents further speculate that the Committee of Style rephrased the qualifications provision in the negative to clarify the delegates' intention "only to prescribe the standing incapacities without imposing any other limit on the historic power of each house to judge qualifications on a case by case basis."[72]

Respondents' argument is inherently weak, however, because it assumes that legislative bodies historically possessed the power to judge qualifications on a case-by-case basis. As noted above, the basis for that conclusion was the Walpole and Wilkes cases, which, by the time of the Convention, had been denounced by the House of Commons and repudiated by at least one State government. Moreover, respondents' argument misrepresents the function of the Committee of Style. It was appointed only "to revise the stile of and arrange the articles which had been agreed to . . . ." 2 Farrand 553.

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[70] See 10 W. Holdsworth, A History of English Law 540–542 (1938).

[71] Holdsworth notes that in the first edition of Blackstone's Commentaries Blackstone enumerated various incapacities and then concluded that "subject to these standing restrictions and disqualifications, every subject of the realm is eligible [for membership in the House of Commons] of common right." 1 W. Blackstone's Commentaries *176. Blackstone was called upon in Commons to defend Wilkes' exclusion and the passage was quoted against him. Blackstone retaliated by writing a pamphlet and making two additions to later editions of his Commentaries in an effort to justify the decision of Parliament. Holdsworth, *supra*, at 540–541.

[72] Appendix D to Brief for Respondents 52.

"[T]he Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief . . . that any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10." [73]

Petitioners also argue that the post-Convention debates over the Constitution's ratification support their interpretation of § 5. For example, they emphasize Hamilton's reply to the antifederalist charge that the new Constitution favored the wealthy and well-born:

> "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*" The Federalist Papers 371 (Mentor ed. 1961). (Emphasis in last sentence added.)

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[73] Warren, *supra*, at 422, n. 1. Charles Warren buttressed his conclusion by noting that the Massachusetts Constitution of 1780 "contained affirmative qualifications for Representatives and exactly similar negative qualifications for Senators." *Ibid.* Apparently, these provisions were not considered substantively different, for each house was empowered in identical language to "judge of the elections, returns and qualifications of their own members, *as pointed out in the constitution.*" Mass. Const., pt. 2, c. I, § 2, Art. IV, 3 Thorpe 1897, and § 3, Art. X, 3 Thorpe 1899. (Emphasis added.) See Warren, *supra*, at 422–423, n. 1.

Madison had expressed similar views in an earlier essay,[74] and his arguments at the Convention leave no doubt about his agreement with Hamilton on this issue.

Respondents counter that Hamilton was actually addressing himself to criticism of Art. I, § 4, which authorizes Congress to regulate the times, places, and manner of electing members of Congress. They note that prominent antifederalists had argued that this power could be used to "confer on the rich and *well-born,* all honours." Brutus No. IV, N. Y. Journal, Nov. 29, 1787, p. 7. (Emphasis in original.) Respondents' contention, however, ignores Hamilton's express reliance on the immutability of the qualifications set forth in the Constitution.[75]

The debates at the state conventions also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution. Before the New York convention, for example, Hamilton emphasized: "[T]he true principle of a republic is, that

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[74] In No. 52 of The Federalist, Madison stated:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. [He then enumerated the qualifications for both representatives and Senators.] . . . Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith." The Federalist Papers 326 (Mentor ed. 1961).

[75] Respondents dismiss Madison's assertion that the "qualifications of the elected, . . . being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention," as nothing more than a refutation of the charge that the new national legislature would be free to establish additional "standing incapacities." However, this conclusion cannot be reconciled with the pre-Convention history on this question, the Convention debates themselves, and, in particular, the delegates' decision to require a two-thirds vote for expulsion.

the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) (hereinafter cited as Elliot's Debates).[76] In Virginia, where the Federalists faced powerful opposition by advocates of popular democracy, Wilson Carey Nicholas, a future member of both the House and Senate and later Governor of the State, met the arguments that the new Constitution violated democratic principles with the following interpretation of Art. I, § 2, cl. 2, as it respects the qualifications of the elected: "It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state." 3 Elliot's Debates 8.

c. Post-Ratification.

As clear as these statements appear, respondents dismiss them as "general statements . . . directed to other issues." [77] They suggest that far more relevant is Congress' own understanding of its power to judge qualifications as manifested in post-ratification exclusion cases. Unquestionably, both the House and the Senate have excluded members-elect for reasons other than their

[76] At the same convention, Robert Livingston, one of the new Constitution's most ardent supporters and one of the State's most substantial landowners, endorsed this same fundamental principle: "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." 2 Elliot's Debates 292–293.

[77] Appendix D to Brief for Respondents 62.

failure to meet the Constitution's standing qualifications. For almost the first 100 years of its existence, however, Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution.

Congress was first confronted with the issue in 1807,[78] when the eligibility of William McCreery was challenged because he did not meet additional residency requirements imposed by the State of Maryland. In recommending that he be seated, the House Committee of Elections reasoned:

> "The committee proceeded to examine the Constitution, with relation to the case submitted to them, and find that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules . . . ." 17 Annals of Cong. 871 (1807).

Lest there be any misunderstanding of the basis for the committee's recommendation, during the ensuing debate the chairman explained the principles by which the committee was governed:

> "The Committee of Elections considered the qualifications of members to have been unalterably de-

[78] In 1797, during the 5th Congress, 1st Session, the House considered expelling Matthew Lyon, a Republican, for sedition. The vote to expel, however, was 49 to 45, and broke down largely along partisan lines. Although Lyon's opponents, the Federalists, retained a majority in the 6th Congress, to which Lyon was re-elected, and although there were political advantages to be gained from trying to prevent him from taking his seat, there was no effort made to exclude him. See Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 J. Pub. L. 103, 123–127 (1968).

> termined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. . . . Congress, by the Federal Constitution, are not authorized to prescribe the qualifications of their own members, but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution, and by them only. These are the principles on which the Election Committee have made up their report, and upon which their resolution is founded." *Id.*, at 872.

The chairman emphasized that the committee's narrow construction of the power of the House to judge qualifications was compelled by the "fundamental principle in a free government," *id.*, at 873, that restrictions upon the people to choose their own representatives must be limited to those "absolutely necessary for the safety of the society." *Id.*, at 874. At the conclusion of a lengthy debate, which tended to center on the more narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution, the House agreed by a vote of 89 to 18 to seat Congressman McCreery. *Id.*, at 1237. See 1 A. Hinds, Precedents of the House of Representatives of the United States § 414 (1907) (hereinafter cited as Hinds).

There was no significant challenge to these principles for the next several decades.[79] They came under heavy

[79] Another Maryland representative was unsuccessfully challenged in 1808 on grounds almost identical to those asserted in the challenge of McCreery. See 18 Annals of Cong. 1848–1849 (1808). In 1844, the Senate declined to exclude John M. Niles, who was accused of being mentally incompetent, after a special committee reported him competent. Cong. Globe, 28th Cong., 1st Sess., 564–565, 602 (1844). In 1856, the House rejected an attempt to exclude Samuel

attack, however, "during the stress of civil war [but initially] the House of Representatives declined to exercise the power [to exclude], even under circumstances of great provocation." [80] Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., § 12, p. 7 (1967). The abandonment of such restraint, however, was among the casualties of the general upheaval produced in war's wake. In 1868, the House voted for the first time in its history to exclude a member-elect. It refused to seat two duly elected representatives for giving aid and comfort to the Confederacy. See 1 Hinds §§ 449–451.[81] "This change was produced by the North's bitter enmity toward those who failed to support the Union cause during the war, and was effected by the Radical Republican domination of Congress. It was a shift brought about by the naked urgency of power and was given little doctrinal support." Comment, Legislative Exclusion: Julian Bond and Adam Clayton Powell, 35 U. Chi. L. Rev. 151, 157 (1967).[82] From that time until

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Marshall for violating an Illinois law prohibiting state judges from running for other offices. 1 Hinds § 415. That same year, the Senate refused to exclude Lyman Trumbull for violating the same Illinois law. *Ibid.*

[80] Between 1862 and 1867, both the House and Senate resisted several attempts to exclude members-elect who were accused of being disloyal to the Union during the Civil War. See, *id.*, §§ 448, 455, 458; Senate Election, Expulsion and Censure Cases, S. Doc. No. 71, 87th Cong., 2d Sess., 21 (1962) (hereinafter cited as Senate Cases).

[81] That same year the Senate also excluded a supporter of the Confederacy. Senate Cases 40. The House excluded two others shortly thereafter, one for the same offense, and another for selling appointments to the Military and Naval Academies. See 1 Hinds §§ 459, 464; 2 Hinds § 1273.

[82] This departure from previous House construction of its power to exclude was emphasized by Congressman William P. Fessenden: "[T]he power which we have under the Constitution to judge of the

the present, congressional practice has been erratic; [83] and on the few occasions when a member-elect was excluded although he met all the qualifications set forth in the

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qualifications of members of the body is not a mere arbitrary power, to be exerted according to the will of the individuals who may vote upon the subject. It ought to be a power subject to certain rules and founded upon certain principles. So it was up to a very late period, until the rebellion. The rule simply was, if a man came here and presented proper credentials from his State, to allow him to take the ordinary oath, which we all took, to support the Constitution, and be admitted, and if there was any objection to him to try that question afterward." Cong. Globe, 40th Cong., 2d Sess., 685 (1868).

[83] For example, in 1870, the House refused to exclude a Texas Congressman accused of a variety of criminal acts, 1 Hinds § 465; but in 1882 and again in 1900 the House excluded a member-elect for practicing polygamy. 1 Hinds §§ 473, 477–480. Thereafter, it apparently did not consider excluding anyone until shortly after World War I, when it twice excluded Victor L. Berger, an avowed Socialist, for giving aid and comfort to the enemy. Significantly, the House committee investigating Berger concluded that he was ineligible under the express provision of § 3 of the Fourteenth Amendment. 6 C. Cannon, Precedents of the House of Representatives of the United States §§ 56–59 (1935) (hereinafter cited as Cannon). Berger, the last person to be excluded from the House prior to Powell, was later re-elected and finally admitted after his criminal conviction was reversed. 65 Cong. Rec. 7 (1923).

The House next considered the problem in 1925 when it contemplated excluding John W. Langley for his alleged misconduct. Langley resigned after losing a criminal appeal, and the House therefore never voted upon the question. 6 Cannon § 238. The most recent exclusion attempt prior to Powell's occurred in 1933, when the House refused to exclude a Representative from Minnesota who had been convicted of sending defamatory matter through the mail. See 77 Cong. Rec. 73–74, 131–139 (1933).

The Senate has not excluded anyone since 1929; in that year it refused to seat a member-elect because of improper campaign expenditures. 6 Cannon § 180. In 1947, a concerted effort was made to exclude Senator Theodore G. Bilbo of Mississippi for allegedly accepting gifts from war contractors and illegally intimidating Negroes in Democratic primaries. See 93 Cong. Rec. 3–28 (1947). He died, however, before a decision was reached.

Constitution, there were frequently vigorous dissents.[84] Even the annotations to the official manual of procedure for the 90th Congress manifest doubt as to the House's power to exclude a member-elect who has met the constitutionally prescribed qualifications. See Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., § 12, pp. 7–8 (1967).

Had these congressional exclusion precedents been more consistent, their precedential value still would be quite limited. See Note, The Power of a House of Congress to Judge the Qualifications of its Members, 81 Harv. L. Rev. 673, 679 (1968).[85] That an unconstitu-

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[84] During the debates over H. R. Res. No. 278, Congressman Celler, chairman of both the Select Committee and the Judiciary Committee, forcefully insisted that the Constitution "unalterably fixes and defines" the qualifications for membership in the House and that any other construction of Art. I, § 5, would be "improper and dangerous." 113 Cong. Rec. 4998. See H. R. Rep. No. 484, 43d Cong., 1st Sess., 11–15 (1874) (views of minority); H. R. Rep. No. 85, 56th Cong., 1st Sess., 53–77 (1900) (views of minority). In the latter report, the dissenters argued: "A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose. . . . The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a member-elect lacks some of the qualifications required by the Constitution." *Id.*, at 76–77.

[85] "Determining the basis for a congressional action is itself difficult; since a congressional action, unlike a reported judicial decision, contains no statement of the reasons for the disposition, one must fall back on the debates and the committee reports. If more than one issue is raised in the debates, one can never be sure on what basis the action was predicated. Unlike a court, which is presumed to be disinterested, in an exclusion case the concerned house is in effect a party to the controversy that it must adjudicate. Consequently,

tional action has been taken before surely does not render that same action any less unconstitutional at a later date. Particularly in view of the Congress' own doubts in those few cases where it did exclude members-elect, we are not inclined to give its precedents controlling weight. The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787. See *Myers* v. *United States*, 272 U. S. 52, 175 (1926). And, what evidence we have of Congress' early understanding confirms our conclusion that the House is without power to exclude any member-elect who meets the Constitution's requirements for membership.

d. Conclusion.

Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Con-

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some members may be inclined to vote for exclusion though they strongly doubt its constitutionality." 81 Harv. L. Rev., at 679.

gress' own post-Civil War exclusion cases, against "vesting an improper & dangerous power in the Legislature." 2 Farrand 249. Moreover, it would effectively nullify the Convention's decision to require a two-thirds vote for expulsion. Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.

For these reasons, we have concluded that Art. I, § 5, is at most a "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the "textual commitment" formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims.

2. Other Considerations.

Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But, as our interpretation of Art. I, § 5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of the respect due [a] coordinate [branch] of government," nor does it involve an "initial policy determination of a kind clearly for non-

judicial discretion." *Baker* v. *Carr*, 369 U. S. 186, at 217. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.[86] See *United States* v. *Brown*, 381 U. S. 437, 462 (1965); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 613–614 (1952) (Frankfurter, J., concurring); *Myers* v. *United States*, 272 U. S. 52, 293 (1926) (Brandeis, J., dissenting).

Nor are any of the other formulations of a political question "inextricable from the case at bar." *Baker* v. *Carr*, *supra*, at 217. Petitioners seek a determination that the House was without power to exclude Powell from the 90th Congress, which, we have seen, requires an interpretation of the Constitution—a determination for which clearly there are "judicially . . . manageable standards." Finally, a judicial resolution of petitioners' claim will not result in "multifarious pronouncements by various departments on one question." For, as we noted in *Baker* v. *Carr*, *supra*, at 211, it is the responsibility of this Court to act as the ultimate interpreter of the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803). Thus, we conclude that petitioners' claim is not barred by the political question doctrine, and, having determined that the claim is otherwise generally justiciable, we hold that the case is justiciable.

VII.

Conclusion.

To summarize, we have determined the following: (1) This case has not been mooted by Powell's seating in

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[86] In fact, the Court has noted that it is an "inadmissible suggestion" that action might be taken in disregard of a judicial determination. *McPherson* v. *Blacker*, 146 U. S. 1, 24 (1892).

the 91st Congress. (2) Although this action should be dismissed against respondent Congressmen, it may be sustained against their agents. (3) The 90th Congress' denial of membership to Powell cannot be treated as an expulsion. (4) We have jurisdiction over the subject matter of this controversy. (5) The case is justiciable.

Further, analysis of the "textual commitment" under Art. I, § 5 (see Part VI, B (1)), has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution. Respondents concede that Powell met these. Thus, there is no need to remand this case to determine whether he was entitled to be seated in the 90th Congress. Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.

Petitioners seek additional forms of equitable relief, including mandamus for the release of petitioner Powell's back pay. The propriety of such remedies, however, is more appropriately considered in the first instance by the courts below. Therefore, as to respondents McCormack, Albert, Ford, Celler, and Moore, the judgment of the Court of Appeals for the District of Columbia Circuit is affirmed. As to respondents Jennings, Johnson, and Miller, the judgment of the Court of Appeals for the District of Columbia Circuit is reversed and the case is remanded to the United States District Court for the District of Columbia with instructions to enter a declaratory judgment and for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I add a few words. As the Court says, the important constitutional question is whether the Congress has the power to deviate from or alter the qualifications for membership as a Representative contained in Art. I, § 2, cl. 2, of the Constitution.[1] Up to now the understanding has been quite clear to the effect that such authority does not exist.[2] To be sure, Art. I, § 5, provides that: "Each

[1] U. S. Const., Art. I, § 2, cl. 2:

"No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

[2] The Constitutional Convention had the occasion to consider several proposals for giving Congress discretion to shape its own qualifications for office and explicitly rejected them. James Madison led the opposition by arguing that such discretion would be

"an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 M. Farrand, Records of the Federal Convention of 1787, pp. 249–250 (1911).

Alexander Hamilton echoed that same conclusion:

"The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." The Federalist Papers, No. 60, p. 371 (Mentor ed. 1961).

And so, too, the early Congress of 1807 decided to seat Representative-elect William McCreery on the ground that its power to "judge" was limited by the enumerated qualifications.

"The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first . . . . Congress, by the Federal Constitution, are not authorized to prescribe the qualifications of their own members, but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed

House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." Contests may arise over whether an elected official meets the "qualifications" of the Constitution, in which event the House is the sole judge.[3] But the House is not the sole judge when "qualifications" are added which are not specified in the Constitution.[4]

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by the Federal Constitution, and by them only." 17 Annals of Cong. 872 (1807) (remarks of Rep. Findley, Chairman of House Committee of Elections).

Constitutional scholars of two centuries have reaffirmed the principle that congressional power to "judge" the qualifications of its members is limited to those enumerated in the Constitution. 1 J. Story, Commentaries on the Constitution 462 (5th ed. 1891); C. Warren, The Making of the Constitution 420–426 (1928). See also remarks by Emmanuel Celler, Chairman of the House Select Committee which inquired into the qualifications of Adam Clayton Powell, Jr., and which recommended seating him:

"The Constitution lays down three qualifications for one to enter Congress—age, inhabitancy, citizenship. Mr. Powell satisfies all three. The House cannot add to these qualifications." 113 Cong. Rec. 4998.

[3] *Baker* v. *Carr*, 369 U. S. 186, 242, n. 2 (DOUGLAS, J., concurring).

[4] The question whether Congress has authority under the Constitution to add to enumerated qualifications for office is itself a federal question within the particular expertise of this Court. *Baker* v. *Carr*, 369 U. S. 186, 211. Where that authority has been exceeded, redress may be properly sought here. *Marbury* v. *Madison*, 1 Cranch 137. Congress itself suspected no less in deciding to exclude Rep. Powell:

"[C]ases may readily be postulated where the action of a House in excluding or expelling a Member may directly impinge upon rights under other provisions of the Constitution. In such cases, the unavailability of judicial review may be less certain. Suppose, for example, that a Member was excluded or expelled because of his religion or race, contrary to the equal protection clause, or for making an unpopular speech protected by the first amendment . . . . [E]xclusion of the Member-elect on grounds other than age, citizenship, or inhabitancy could raise an equally serious constitutional issue." H. R. Rep. No. 27, 90th Cong., 1st Sess., 30 (1967).

See also 113 Cong. Rec. 4994.

A man is not seated because he is a Socialist or a Communist.[5]

Another is not seated because in his district members of a minority are systematically excluded from voting.[6]

Another is not seated because he has spoken out in opposition to the war in Vietnam.[7]

The possible list is long. Some cases will have the racist overtones of the present one.

Others may reflect religious or ideological clashes.[8]

At the root of all these cases, however, is the basic integrity of the electoral process. Today we proclaim the constitutional principle of "one man, one vote." When that principle is followed and the electors choose a person who is repulsive to the Establishment in Congress, by what constitutional authority can that group of electors be disenfranchised?

By Art. I, § 5, the House may "expel a Member" by a vote of two-thirds. And if this were an expulsion case I would think that no justiciable controversy would be presented, the vote of the House being two-thirds or more. But it is not an expulsion case. Whether it could have been won as an expulsion case, no one knows. Expulsion for "misconduct" may well raise different questions, different considerations. Policing the conduct of members, a recurring problem in the Senate and House as well, is quite different from the initial decision whether an elected official should be seated. It well might be easier to bar admission than to expel one already seated.

The House excluded Representative-elect Powell from the 90th Congress allegedly for misappropriating public funds and for incurring the contempt of New York

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[5] Case of Victor Berger, 6 C. Cannon, Precedents of the House of Representatives of the United States § 56 (1935).

[6] *Id.*, at § 122.

[7] See, *e. g.*, *Bond* v. *Floyd*, 385 U. S. 116.

[8] 1 A. Hinds, Precedents of the House of Representatives of the United States § 481 (1907).

courts.[9] Twenty-six years earlier, members of the upper chamber attempted to exclude Senator-elect William Langer of North Dakota for like reasons.[10] Langer first became State's Attorney for Morton County, North Dakota, from 1914 to 1916, and then served as State Attorney General from 1916 to 1920. He became Governor of the State in 1932 and took office in January 1933. In 1934 he was indicted for conspiring to interfere with the enforcement of federal law by illegally soliciting political contributions from federal employees, and suit was filed in the State Supreme Court to remove him from office.[11] While that suit was pending, he called the State Legislature into special session.[12] When it became clear that the court would order his ouster, he signed a Declaration of Independence, invoked martial law, and called out the National Guard.[13] Nonetheless, when his own officers refused to recognize him as the legal head of state, he left office in July 1934. As with Adam Clayton Powell, however, the people of the State still wanted him. In 1937 they re-elected him Governor and, in 1940, they sent him to the United States Senate.

During the swearing-in ceremonies, Senator Barkley drew attention to certain complaints filed against Langer by citizens of North Dakota, yet asked that he be allowed to take the oath of office

> "without prejudice, which is a two-sided proposition—without prejudice to the Senator and without

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[9] 113 Cong. Rec. 4997.

[10] S. Doc. No. 71 on Senate Election, Expulsion and Censure Cases from 1789 to 1960, 87th Cong., 2d Sess., 140 (1962).

[11] Hearings on A Protest to the Seating of William Langer, before the Senate Committee on Privileges and Elections, 77th Cong., 1st Sess., 820 (Nov. 3, 18, 1941) (hereinafter Hearings).

[12] Hearings 821.

[13] Hearings 820.

prejudice to the Senate in the exercise of its right [to exclude him]." [14]

The matter of Langer's qualifications to serve in the Senate was referred to committee which held confidential hearings on January 9 and 16, 1941, and open hearings on November 3 and 18, 1941. By a vote of 14 to 2, the committee reported that a majority of the Senate had jurisdiction under Art. I, § 5, cl. 1, of the Constitution to exclude Langer; and, by a vote of 13 to 3, it reported its recommendation that Langer not be seated.[15]

The charges against Langer were various. As with Powell, they included claims that he had misappropriated public funds [16] and that he had interfered with the judicial process in a way that beclouded the dignity of Congress.[17] Reference was also made to his professional ethics as a lawyer.[18]

Langer enjoyed the powerful advocacy of Senator Murdock from Utah. The Senate debate itself raged

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[14] 87 Cong. Rec. 3–4 (1941).

[15] S. Rep. No. 1010, 77th Cong., 2d Sess. (1942).

[16] It was alleged that he had conspired as Governor to have municipal and county bonds sold to a friend of his who made a profit of $300,000 on the purchase, and purportedly rebated as much as $56,000 to Langer himself. Hearings 822–823.

[17] At the retrial of his conviction for conspiring to interfere with the enforcement of federal law, he was said to have paid money to have a friend of his, Judge Wyman, be given control of the litigation, and to have "meddled" with the jury. Hearings 20–42, 120–130.

[18] He was charged as a lawyer with having accepted $2,000 from the mother of a boy in prison on the promise that he would obtain his pardon, when he knew, in fact, that a pardon was out of the question. He was also said to have counseled a defendant-client of his to marry the prosecution's chief witness in order to prevent her from testifying against him. And finally, it was suggested that he once bought an insurance policy during trial from one of the jurors sitting in judgment of his client. Hearings 820–830.

for over a year.[19] Much of it related to purely factual allegations of "moral turpitude." Some of it, however, was addressed to the power of the Senate under Art. I, § 5, cl. 1, to exclude a member-elect for lacking qualifications not enumerated in Art. I, § 3.

> "Mr. MURDOCK. . . . [U]nder the Senator's theory that the Senate has the right to add qualifications which are not specified in the Constitution, does the Senator believe the Senate could adopt a rule specifying intellectual and moral qualifications? [20]
>
> "Mr. LUCAS. The Senate can do anything it wants to do . . . . Yes; the Senate can deny a person his seat simply because it does not like the cut of his jaw, if it wishes to." [21]

Senator Murdock argued that the only qualifications for service in the Senate were those enumerated in the Constitution; that Congress had the power to review those enumerated qualifications; but that it could not—while purporting to "judge" those qualifications—in reality add to them.

> "Mr. LUCAS. The Senator referred to article I, section 5. What does he think the framers of the Constitution meant when they gave to each House the power to determine or to judge the qualifications, and so forth, of its own Members? [22]
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> "Mr. MURDOCK. I construe the term 'judge' to mean what it is held to mean in its common, ordinary usage. My understanding of the definition of the

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[19] 87 Cong. Rec. 3–4, 460 (1941); 88 Cong. Rec. 822, 828, 1253, 2077, 2165, 2239, 2328, 2382, 2412, 2472, 2564, 2630, 2699, 2759, 2791, 2801, 2842, 2858, 2914, 2917, 2959, 2972, 2989, 3038, 3051, 3065, 5668 (1942).

[20] 88 Cong. Rec. 2401.

[21] *Ibid.*

[22] 88 Cong. Rec. 2474.

> word 'judge' as a verb is this: When we judge of a thing it is supposed that the rules are laid out; the law is there for us to look at and to apply to the facts.
>
> "But whoever heard the word 'judge' used as meaning the power to add to what already is the law?" [23]

It was also suggested from the floor that the enumerated qualifications in § 3 were only a *minimum* which the Senate could supplement; and that the Founding Fathers so intended by using words of the negative. To which Senator Murdock replied—

> "Mr. President, I think it is the very distinguished and able Senator from Georgia who makes the contention that the constitutional provisions relating to qualifications, because they are stated in the negative—that is, 'no person shall be a Senator'—are merely restrictions or prohibitions on the State; but—and I shall read it later on—when we read what Madison said, when we read what Hamilton said, when we read what the other framers of the Constitution said on that question, there cannot be a doubt as to what they intended and what they meant.[24]
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> . . . . .
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> "Madison knew that the qualifications should be contained in the Constitution and not left to the whim and caprice of the legislature.[25]
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> . . . . .
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> "Bear that in mind, that the positive or affirmative phraseology was not changed to the negative by debate or by amendment in the convention, but it

[23] *Ibid.*
[24] *Ibid.*
[25] 88 Cong. Rec. 2483.

was changed by the committee of which Madison was a member, the committee on style." [26]

The Senate was nonetheless troubled by the suggestion that the Constitution compelled it to accept anyone whom the people might elect, no matter how egregious and even criminal his behavior. No need to worry, said Murdock. It is true that the Senate cannot invoke its majority power to "judge" under Art. I, § 5, cl. 1, as a device for excluding men elected by the people who possess the qualifications enumerated by the Constitution. But it does have the power under Art. I, § 5, cl. 2, to expel anyone it designates by a two-thirds vote. Nonetheless, he urged the Senate not to bypass the two-thirds requirement for expulsion by wrongfully invoking its power to exclude.[27]

"Mr. LUCAS. . . . The position the Senator from Utah takes is that it does not make any difference what a Senator does in the way of crime, that whenever he is elected by the people of his State, comes here with bona fide credentials, and there is no fraud in the election, the Senate cannot refuse to give him the oath. That is the position the Senator takes?

"Mr. MURDOCK. That is my position; yes.[28]

. . . . . .

"My position is that we do not have the right to exclude anyone who comes here clothed with the proper credentials and possessing the constitutional qualifications. My position is that we do not have

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[26] 88 Cong. Rec. 2484.

[27] Although the House excluded Adam Clayton Powell by over two-thirds vote, it was operating on the assumption that only a majority was needed. For the suggestion that the House could never have rallied the votes to exclude Powell on the basis of a two-thirds ground rule, see Note, 14 How. L. J. 162 (1968); Note, 42 N. Y. U. L. Rev. 716 (1967).

[28] 88 Cong. Rec. 2488.

the right under the provision of the Constitution to which the Senator from Florida referred, to add to the qualifications. My position is that the State is the sole judge of the intellectual and the moral qualifications of the representatives it sends to Congress." [29]

"MR. MURDOCK [quoting Senator Philander Knox]. 'I know of no defect in the plain rule of the Constitution for which I am contending. . . . I cannot see that any danger to the Senate lies in the fact that an improper character cannot be excluded without a two-thirds vote. It requires the unanimous vote of a jury to convict a man accused of crime; it should require, and I believe that it does require, a two-thirds vote to eject a Senator from his position of honor and power, to which he has been elected by a sovereign State.' " [30]

Thus, after a year of debate, on March 27, 1942, the Senate overruled the recommendation of its committee and voted 52 to 30 to seat Langer.

I believe that Senator Murdock stated the correct constitutional principle governing the present case.

MR. JUSTICE STEWART, dissenting.

I believe that events which have taken place since certiorari was granted in this case on November 18, 1968, have rendered it moot, and that the Court should therefore refrain from deciding the novel, difficult, and delicate constitutional questions which the case presented at its inception.

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[29] 88 Cong. Rec. 2490.

[30] 88 Cong. Rec. 2488. Senator Knox of Pennsylvania had defended Senator-elect Reed Smoot of Utah in 1903 against charges that he ought to be excluded because of his affiliation with a group (Mormons) that countenanced polygamy. S. Doc. No. 71, 87th Cong., 2d Sess., 97.

I.

The essential purpose of this lawsuit by Congressman Powell and members of his constituency was to regain the seat from which he was barred by the 90th Congress. That purpose, however, became impossible of attainment on January 3, 1969, when the 90th Congress passed into history and the 91st Congress came into being. On that date, the petitioners' prayer for a judicial decree restraining enforcement of House Resolution No. 278 and commanding the respondents to admit Congressman Powell to membership in the 90th Congress became incontestably moot.

The petitioners assert that actions of the House of Representatives of the 91st Congress have prolonged the controversy raised by Powell's exclusion and preserved the need for a judicial declaration in this case. I believe, to the contrary, that the conduct of the present House of Representatives confirms the mootness of the petitioners' suit against the 90th Congress. Had Powell been excluded from the 91st Congress, he might argue that there was a "continuing controversy" concerning the exclusion attacked in this case.[1] And such an argument might be sound even though the present House of Representatives is a distinct legislative body rather than a continuation of its predecessor,[2] and though any griev-

[1] See, *e. g., United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 202–204; *Carroll* v. *President and Commissioners of Princess Anne*, 393 U. S. 175, 178–179.

[2] See *Gojack* v. *United States*, 384 U. S. 702, 707, n. 4 ("Neither the House of Representatives nor its committees are continuing bodies"); *McGrain* v. *Daugherty*, 273 U. S. 135, 181. Forty-one of the present members of the House were not members of the 90th Congress; and two of the named defendants in this action, Messrs. Moore and Curtis, are no longer members of the House of Representatives. Moreover, the officer-employees of the House, such as the Sergeant at Arms, are re-elected by each new Congress. See n. 15, *infra*.

ance caused by conduct of the 91st Congress is not redressable in this action. But on January 3, 1969, the House of Representatives of the 91st Congress admitted Congressman Powell to membership, and he now sits as the Representative of the 18th Congressional District of New York. With the 90th Congress terminated and Powell now a member of the 91st, it cannot seriously be contended that there remains a judicial controversy between these parties over the power of the House of Representatives to exclude Powell and the power of a court to order him reseated. Understandably, neither the Court nor the petitioners advance the wholly untenable proposition that the continuation of this case can be founded on the infinitely remote possibility that Congressman Powell, or any other Representative, may someday be excluded for the same reasons or in the same manner. And because no foreseeable possibility of such future conduct exists, the respondents have met their heavy burden of showing that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203.[3]

The petitioners further argue that this case cannot be deemed moot because of the principle that "the voluntary abandonment of a practice does not relieve a court of adjudicating its legality . . . ." *Gray* v. *Sanders*, 372

[3] See also *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448. The Court has only recently concluded that there was no "controversy" in *Golden* v. *Zwickler*, 394 U. S. 103, because of "the fact that it was most unlikely that the Congressman would again be a candidate for Congress." *Id.*, at 109. It can hardly be maintained that the likelihood of the House of Representatives' again excluding Powell is any greater.

U. S. 368, 376.[4] I think it manifest, however, that this principle and the cases enunciating it have no application to the present case. In the first place, this case does not involve "the voluntary abandonment of a practice." Rather it became moot because of an event over which the respondents had no control—the expiration of the 90th Congress. Moreover, unlike the cases relied on by the petitioners, there has here been no ongoing course of conduct of indefinite duration against which a permanent injunction is necessary. Thus, it cannot be said of the respondents' actions in this case, as it was of the conduct sought to be enjoined in *Gray*, for example, that "the practice is deeply rooted and long standing," *ibid.*, or that, without judicial relief, the respondents would be "free to return to [their] old ways." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632.[5] Finally, and

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[4] See also *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633; *Local 74, United Bro. of Carpenters & Joiners* v. *NLRB*, 341 U. S. 707, 715; *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43; *Hecht Co.* v. *Bowles*, 321 U. S. 321, 327; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 307–310.

[5] With the exception of *Gray*, the "continuing controversy" cases relied on by the petitioners were actions by the Government or its agencies to halt illegal conduct of the defendants, and, by example, of others engaged in similar conduct. See cases cited, *supra*, nn. 1, 3, 4. The principle that voluntary abandonment of an illegal practice will not make an action moot is especially, if not exclusively, applicable to such public law enforcement suits.

"Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights . . . of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court . . . . The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public

most important, the "voluntary abandonment" rule does not dispense with the requirement of a continuing controversy, nor could it under the definition of the judicial power in Article III of the Constitution. Voluntary cessation of unlawful conduct *does* make a case moot "if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" *Id.*, at 633.[6] Since that is the situation here, the case would be moot even if it could be said that it became so by the House's "voluntary abandonment" of its "practice" of excluding Congressman Powell.

The petitioners' proposition that conduct of the 91st Congress has perpetuated the controversy is based on the fact that House Resolution No. 2—the same resolution by which the House voted to seat Powell—fined him $25,000 and provided that his seniority was to commence as of the date he became a member of the 91st Congress.[7] That punishment, it is said, "arises out of the

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under the act of Congress, by [voluntary cessation of the challenged conduct]." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S., at 309.

The considerations of public enforcement of a statutory or regulatory scheme which inhere in those cases are not present in this litigation.

[6] Certainly in every decision relied on by the petitioners the Court did not reject the mootness argument solely on the ground that the illegal practice had been voluntarily terminated. In each it proceeded to determine that there was in fact a continuing controversy.

[7] House Resolution No. 2 provided in pertinent part:

"(2) That as punishment Adam Clayton Powell be and he hereby is fined the sum of $25,000, said sum to be paid to the Clerk to be disposed of by him according to law. The Sergeant at Arms of the House is directed to deduct $1,150 per month from the salary otherwise due the said Adam Clayton Powell, and pay the same to said Clerk until said $25,000 fine is fully paid.

"(3) That as further punishment the seniority of the said Adam

prior actions of the House which originally impelled this action." It is indisputable, however, that punishment of a House member involves constitutional issues entirely distinct from those raised by exclusion,[8] and that a punishment in one Congress is in no legal sense a "continuation" of an exclusion from the previous Congress. A judicial determination that the exclusion was improper would have no bearing on the constitutionality of the punishment, nor any conceivable practical impact on Powell's status in the 91st Congress. It is thus clear that the only connection between the exclusion by the 90th Congress and the punishment by the 91st is that they were evidently based on the same asserted derelictions of Congressman Powell. But this action was not brought to exonerate Powell or to expunge the legislative findings of his wrongdoing; its only purpose was to restrain the action taken in consequence of those findings—Powell's exclusion.

Equally without substance is the petitioners' contention that this case is saved from mootness by application of the asserted "principle" that a case challenging allegedly unconstitutional conduct cannot be rendered moot

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Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 91st Congress."

The petitioners' argument that the case is kept alive by Powell's loss of seniority, see *ante*, at 496, is founded on the mistaken assumption that the loss of seniority is attributable to the exclusion from the 90th Congress and that seniority would automatically be restored if that exclusion were declared unconstitutional. But the fact is that Powell was stripped of seniority by the action of the 91st Congress, action which is not involved in this case and which would not be affected by judicial review of the exclusion from the 90th Congress. Moreover, even if the conduct of the 91st Congress were challenged in this case, the Court would clearly have no power whatsoever to pass upon the propriety of such internal affairs of the House of Representatives.

[8] Article I, § 5, of the Constitution specifically empowers each House to "punish its Members for disorderly Behaviour."

by further unconstitutional conduct of the defendants. Under this hypothesis, it is said that the "Court can not determine that the conduct of the House on January 3, 1969, has mooted this controversy without inferentially, at least, holding that the action of the House of that day was legal and constitutionally permissible." If there is in our jurisprudence any doctrine remotely resembling the petitioners' theory—which they offer without reference to any authority—it has no conceivable relevance to this case. For the events of January 3, 1969, that made this case moot were the termination of the 90th Congress and Powell's seating in the 91st, *not* the punishment which the petitioners allege to have been unconstitutional. That punishment is wholly irrelevant to the question of mootness and is in no wise before the Court in this case.

II.

The passage of time and intervening events have, therefore, made it impossible to afford the petitioners the principal relief they sought in this case. If any aspect of the case remains alive, it is only Congressman Powell's individual claim for the salary of which he was deprived by his absence from the 90th Congress.[9] But even if that claim can be said to prevent this controversy from being moot, which I doubt, there is no need to reach the fundamental constitutional issues that the Court today undertakes to decide.

This Court has not in the past found that an incidental claim for back pay preserves the controversy between a legislator and the legislative body which evicted him, once the term of his eviction has expired. *Alejandrino* v. *Quezon*, 271 U. S. 528, was a case nearly identical to

[9] The salary claim is personal to Congressman Powell, and the other petitioners therefore clearly have no further interest in this lawsuit.

that before the Court today. The petitioner was a member of the Senate of the Philippines who had been suspended for one year for assaulting a colleague. He brought an action in the Supreme Court of the Philippines against the elected members of the Senate [10] and its officers and employees (the President, Secretary, Sergeant at Arms, and Paymaster), seeking a writ of mandamus and an injunction restoring him to his seat and to all the privileges and emoluments of office. The Supreme Court of the Philippines dismissed the action for want of jurisdiction and Alejandrino brought the case here,[11] arguing that the suspension was not authorized by the Philippine Autonomy Act, a statute which incorporated most of the provisions of Article I of the United States Constitution.[12]

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[10] The Philippines Senate was composed of 24 Senators, 22 of whom were elected, and two of whom were appointed by the Governor General. Alejandrino was one of the two appointees. See 271 U. S., at 531–532.

[11] Under the Philippine Autonomy Act, 39 Stat. 545, this Court had jurisdiction to examine by writ of error the final judgments and decrees of the Supreme Court of the Philippine Islands in cases under the Constitution or statutes of the United States. A subsequent statute substituted the writ of certiorari. 39 Stat. 726.

[12] "Section 18 [of the Autonomy Act] provides that the Senate and House respectively shall be the sole judges of the elections, returns and qualifications of their elective members, and each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel an elective member. The Senators and Representatives shall receive an annual compensation for their services to be ascertained by law and paid out of the Treasury of the Philippine Islands. Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place." 271 U. S., at 532.

Because the period of the suspension had expired while the case was pending on certiorari, a unanimous Court, in an opinion by Chief Justice Taft, vacated the judgment and remanded the case with directions to dismiss it as moot. To Alejandrino's claim that his right to back pay kept the case alive, the Court gave the following answer, which, because of its particular pertinency to this case, I quote at length:

> "It may be suggested, as an objection to our vacating the action of the court below, and directing the dismissal of the petition as having become a moot case, that, while the lapse of time has made unnecessary and futile a writ of mandamus to restore Senator Alejandrino to the Island Senate, there still remains a right on his part to the recovery of his emoluments, which were withheld during his suspension, and that we ought to retain the case for the purpose of determining whether he may not have a mandamus for this purpose. . . . It is difficult for the Court to deal with this feature of the case, which is really only a mere incident to the main question made in the petition and considered in the able and extended brief of counsel for the petitioner, and the only brief before us. That brief is not in any part of it directed to the subject of emoluments, nor does it refer us to any statute or to the rules of the Senate by which the method of paying Senators' salaries is provided, or in a definite way describe the duties of the officer or officers or committee charged with the ministerial function of paying them.
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> . . . . . .
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> ". . . the remedy of the Senator would seem to be by mandamus to compel such official in the discharge of his ministerial duty to pay him the salary due, and the presence of the Senate as a party would be

unnecessary. Should that official rely upon the resolution of the Senate as a reason for refusing to comply with his duty to pay Senators, the validity of such a defense and the validity of the resolution might become a judicial question affecting the personal right of the complaining Senator, properly to be disposed of in such action, but not requiring the presence of the Senate as a party for its adjudication. The right of the petitioner to his salary does not therefore involve the very serious issue raised in this petition as to the power of the Philippine Supreme Court to compel by mandamus one of the two legislative bodies constituting the legislative branch of the Government to rescind a resolution adopted by it in asserted lawful discipline of one of its members, for disorder and breach of privilege. We think, now that the main question as to the validity of the suspension has become moot, the incidental issue as to the remedy which the suspended Senator may have in recovery of his emoluments, if illegally withheld, should properly be tried in a separate proceeding against an executive officer or officers as described. As we are not able to derive from the petition sufficient information upon which properly to afford such a remedy, we must treat the whole cause as moot and act accordingly. This action on our part of course is without prejudice to a suit by Senator Alejandrino against the proper executive officer or committee by way of mandamus or otherwise to obtain payment of the salary which may have been unlawfully withheld from him." 271 U. S., at 533, 534–535.[13]

[13] The petitioners rely on the following passage from *Bond* v. *Floyd*, 385 U. S. 116, 128, n. 4, as dispositive of their contention that the salary claim prevents this case from being moot:

"A question was raised in oral argument as to whether this case might not be moot since the session of the House which excluded

Both of the factors on which the Court relied in *Alejandrino* are present in this case. Indeed, the salary claim is an even more incidental and subordinate aspect of this case than it was of *Alejandrino*.[14] And the availability of effective relief for that claim against any of the present respondents is far from certain. As in *Alejandrino*, the briefs and memoranda submitted by the parties in this case contain virtually no discussion of this question—the only question of remedy remaining in the case. It appears from relevant provisions of law, however, that the Sergeant at Arms of the House—an official newly

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Bond was no longer in existence. The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded."

I do not believe that this offhand dictum in *Bond* is determinative of the issue of mootness in this case. In the first place, as the Court in *Bond* noted, it was not there contended by any party that the case was moot. Moreover, contrary to the implication of the statement, the legislative term from which Bond was excluded had not ended at the time of the Court's decision. (The Court's decision was announced on December 5, 1966; Bond's term of office expired on December 31, 1966.) In any event, he had not been seated in a subsequent term, so the continuing controversy had not been rendered clearly moot by any action of the Georgia House, as it has here by the House of Representatives of the 91st Congress. No one suggested in *Bond* that the money claim was the only issue left in the case. Furthermore, the considerations which governed the Court's decision in *Alejandrino* were simply not present in *Bond*. Because of the State's stipulation, there was no doubt, as there is here, see *infra*, at 570–571, that the Court's decision would lead to effective relief with respect to Bond's salary claim. And finally, there was no suggestion that Bond had an alternative remedy, as Powell has here, see *infra*, at 571–572, by which he could obtain full relief without requiring the Court to decide novel and delicate constitutional issues.

[14] Alejandrino was the only petitioner in the case, and since he was an appointed Senator, it appears that there was no group of voters who remained without representation of their choice in the Senate during his suspension.

elected by each Congress [15]—is responsible for the retention and disbursement to Congressmen of the funds appropriated for their salaries. These funds are payable from the United States Treasury [16] upon requisitions presented by the Sergeant at Arms, who is entrusted with keeping the books and accounts "for the compensation and mileage of Members." [17] A Congressman who has presented his credentials and taken the oath of office [18] is entitled to be paid monthly on the basis of certificates of the Clerk [19] and Speaker of the House.[20] Powell's prayer for a mandamus and an injunction against the Sergeant at Arms is presumably based on this statutory scheme.

Several important questions remain unanswered, however, on this record. Is the Sergeant at Arms the only necessary defendant? If so, the case is surely moot as to the other respondents, including the House members, and they should be dismissed as parties on that ground rather than after resolution of difficult constitutional questions under the Speech or Debate Clause. But it is far from clear that Powell has an appropriate or adequate remedy against the remaining respondents. For if the Speaker does not issue the requisite certificates and the House does not rescind Resolution No. 278, can the House agents be enjoined to act in direct contravention of the orders of their employers? Moreover, the office of Sergeant at Arms of the 90th Congress has now expired, and the present Sergeant at Arms serves the 91st Congress. If he were made a party in that capacity, would he have the authority—or could the 91st Congress

[15] Act of Oct. 1, 1890, § 6, 26 Stat. 646, 2 U. S. C. § 83.
[16] U. S. Const., Art. I, § 6; 2 U. S. C. § 47.
[17] 2 U. S. C. §§ 80, 78.
[18] 2 U. S. C. § 35.
[19] 2 U. S. C. § 34.
[20] 2 U. S. C. § 48.

confer the authority—to disburse money for a salary owed to a Representative in the previous Congress, particularly one who never took the oath of office? Presumably funds have not been appropriated to the 91st Congress or requisitioned by its Sergeant at Arms for the payment of salaries to members of prior Congresses. Nor is it ascertainable from this record whether money appropriated for Powell's salary by the 90th Congress, if any, remains at the disposal of the current House and its Sergeant at Arms.[21]

There are, then substantial questions as to whether, on his salary claim, Powell could obtain relief against any or all of these respondents. On the other hand, if he was entitled to a salary as a member of the 90th Congress, he has a certain and completely satisfactory remedy in an action for a money judgment against the United States in the Court of Claims.[22] While that court could not have ordered Powell seated or entered a declaratory judgment on the constitutionality of his exclusion,[23] it

[21] The respondents allege without contradiction that the Sergeant at Arms does not have sufficient funds to pay Congressman Powell's back salary claims. Separate appropriations for the salaries of Congressmen are made in each fiscal year, see, *e. g.*, 80 Stat. 354, 81 Stat. 127, 82 Stat. 398, and, according to the respondents, "it is the custom of the Sergeant to turn back to the Treasury all unexpended funds at the end of each fiscal year." Thus, the only funds still held by the Sergeant are said to be those appropriated for the present fiscal year commencing July 1, 1968.

[22] "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ." 28 U. S. C. § 1491. The district courts have concurrent jurisdiction over such claims only in amounts less than $10,000. 28 U. S. C. § 1346.

[23] *United States* v. *King*, *ante*, p. 1. The petitioners suggest that the inability of the Court of Claims to grant such relief might make any remedy in that court inadequate. But since Powell's only remaining interest in the case is to collect his salary, a money judgment in the Court of Claims would be just as good as, and probably

is not disputed that the Court of Claims could grant him a money judgment for lost salary on the ground that his discharge from the House violated the Constitution. I would remit Congressman Powell to that remedy, and not simply because of the serious doubts about the availability of the one he now pursues. Even if the mandatory relief sought by Powell is appropriate and could be effective, the Court should insist that the salary claim be litigated in a context that would clearly obviate the need to decide some of the constitutional questions with which the Court grapples today, and might avoid them altogether.[24] In an action in the Court of Claims for a money judgment against the United States, there would be no question concerning the impact of the Speech or Debate Clause on a suit against members of the House of Representatives and their agents, and questions of jurisdiction and justiciability would, if raised at all, be in a vastly different and more conventional form.

In short, dismissal of Powell's action against the legislative branch would not in the slightest prejudice his money claim,[25] and it would avoid the necessity of decid-

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better than, mandatory relief against the agents of the House. The petitioners also suggest that the Court of Claims would be unable to grant relief because of the pendency of Powell's claim in another court, 28 U. S. C. § 1500, but that would, of course, constitute no obstacle if, as I suggest, the Court should order this action dismissed on grounds of mootness.

[24] It is possible, for example, that the United States in such an action would not deny Powell's entitlement to the salary but would seek to offset that sum against the amounts which Powell was found by the House to have appropriated unlawfully from Government coffers to his own use.

[25] Relying on *Bank of Marin* v. *England*, 385 U. S. 99, 101, the petitioners complain that it would impose undue hardship on Powell to force him to "start all over again" now that he has come this far in the present suit. In view of the Court's remand of this case for further proceedings with respect to Powell's remedy, it is at

ing constitutional issues which, in the petitioners' words, "touch the bedrock of our political system [and] strike at the very heart of representative government." If the fundamental principles restraining courts from unnecessarily or prematurely reaching out to decide grave and perhaps unsettling constitutional questions retain any vitality, see *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (Brandeis, J., concurring), surely there have been few cases more demanding of their application than this one. And those principles are entitled to special respect in suits, like this suit, for declaratory and injunctive relief, which it is within a court's broad discretion to withhold. "We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations." *Public Affairs Press* v. *Rickover*, 369 U. S. 111, 112. "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U. S. 426, 431.

If this lawsuit is to be prolonged, I would at the very least not reach the merits without ascertaining that a decision can lead to some effective relief. The Court's remand for determination of that question implicitly recognizes that there may be no remaining controversy between petitioner Powell and any of these respondents redressable by a court, and that its opinion today may be wholly advisory. But I see no good reason for any court even to pass on the question of the availability

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least doubtful that remitting him to an action in the Court of Claims would entail much more cost and delay than will be involved in the present case. And the inconvenience to litigants of further delay or litigation has never been deemed to justify departure from the sound principle, rooted in the Constitution, that important issues of constitutional law should be decided only if necessary and in cases presenting concrete and living controversies.

of relief against any of these respondents. Because the essential purpose of the action against them is no longer attainable and Powell has a fully adequate and far more appropriate remedy for his incidental back-pay claim, I would withhold the discretionary relief prayed for and terminate this lawsuit now. Powell's *claim* for salary may not be dead, but this *case* against all these respondents is truly moot. Accordingly, I would vacate the judgment below and remand the case with directions to dismiss the complaint.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* GISSEL PACKING CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 573. Argued March 26, 1969.—Decided June 16, 1969.*

In Nos. 573 and 691, Unions waged organizational campaigns, obtained authorization cards from a majority of employees in the appropriate bargaining units, and demanded recognition by the employers. The employers refused to bargain, on the ground that the cards were inherently unreliable, and carried out vigorous antiunion campaigns. In one instance the Union did not seek a representation election but filed unfair labor practice charges against the employer; in a second, an election sought by the Union was not held because of unfair labor practice charges filed by the Union as a result of the employer's antiunion campaign; and in the third, an election petitioned by the Union and won by the employer was set aside by the National Labor Relations Board (NLRB) because of the employer's pre-election unfair labor practices. In each instance the NLRB found that the Union had obtained valid authorization cards from a majority of the employees in the bargaining unit and was thus entitled to represent the employees for bargaining purposes, and that the employer's refusal to bargain, in violation of § 8 (a) (5) of the National Labor Relations Act, was motivated, not by a "good faith" doubt of the Union's majority status, but by a desire to gain time to dissipate that status. The NLRB ordered the employers to stop their unfair labor practices, offer reinstatement and back pay to employees discriminatorily discharged, and to bargain with the Unions on request. The Court of Appeals for the Fourth Circuit upheld the NLRB's findings as to violations of §§ 8 (a) (1) and (3) but declined to enforce the orders to bargain, holding that the Taft-Hartley amendments to the Act withdrew the NLRB's

*Together with No. 691, *Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO* v. *Gissel Packing Co., Inc.*, also on certiorari to the same court, argued March 26, 1969, and No. 585, *Sinclair Co.* v. *National Labor Relations Board*, on certiorari to the United States Court of Appeals for the First Circuit, argued March 26–27, 1969.

authority to order an employer to bargain under § 8 (a)(5) on the basis of cards, in the absence of NLRB certification, unless the employer knows, independently of the cards, that there is in fact no representation dispute. The court held that the cards were so inherently unreliable that their use gave the employer an automatic, good faith claim that such a dispute existed, for which an election was necessary. In No. 585, after the Union announced to the employer that it held authorization cards from a majority of the bargaining unit, and the employer claimed it had a good faith doubt of majority status, the Union petitioned for an election. From the time the employer first learned of the Union's drive until the election, the company's president talked and wrote to the employees. The NLRB stated that the communications "reasonably tended to convey . . . the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers," and constituted a violation of § 8 (a)(1). The NLRB set aside the election because the employer "interfered with the exercise of a free and untrammeled choice in the election," found that the Union had a valid card majority when it demanded recognition and that the employer declined recognition in order to gain time to dissipate that majority status in violation of § 8 (a)(5). The employer was ordered to bargain on request. The Court of Appeals for the First Circuit sustained the NLRB's findings and enforced its order. *Held:*

1. To obtain recognition as the exclusive bargaining representative under the Act, a union has not been required, prior to or since the Taft-Hartley amendments, to obtain certification as a winner of an NLRB election; it can establish majority status by possession of cards signed by a majority of the employees authorizing the union to represent them for bargaining purposes. Pp. 595–600.

2. Authorization cards can adequately reflect employee desires for representation and the NLRB's rules for controlling card solicitation are adequate safeguards against union misrepresentation and coercion where the cards are clear and unambiguous on their face. Pp. 601–610.

(a) The NLRB's rule set forth in *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268, that an unambiguous authorization card will be counted unless it is proved that the employee was told that the card was to be used *solely* to obtain an election, should not be applied mechanically. Pp. 607–609.

(b) An employer is not obligated to accept a card check as proof of majority status under the NLRB's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. Not every employer unfair labor practice will necessarily support a bargaining order. Pp. 609–610.

3. The issuance of a bargaining order is an appropriate remedy where an employer who has rejected a card majority has committed unfair labor practices which have made the holding of a fair election unlikely, or which have undermined a union's majority, caused an election to be set aside, and made the holding of a fair rerun election unlikely. Pp. 610–616.

(a) In fashioning a remedy the NLRB can consider the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future, and if it finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies is slight and that employee sentiment once expressed through cards would be better protected by a bargaining order, such order should issue. Pp. 614–615.

(b) Because the NLRB's findings in Nos. 573 and 691 were based on its former practice of phrasing its findings in terms of an employer's good or bad faith doubts of a union's majority status, these cases are remanded for proper findings. Pp. 615–616.

4. An employer's free speech right to communicate with his employees is firmly established and cannot be infringed by a union or by the NLRB, and § 8 (c) merely implements the First Amendment by requiring that the expression of "any views, argument or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8 (a) (1). Pp. 616–620.

(a) An assessment of the precise scope of employer expression must be made in the context of its labor relations setting, and an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied and protected in the Act. Pp. 617–618.

(b) An employer may communicate to his employees any of his general views on unionism and his specific views about a particular union, as long as there is no "threat of reprisal or force or promise of benefit." He may predict the precise effects he

believes unionization will have on his company, if the prediction is based on objective fact to convey his belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. Pp. 618–619.

(c) In No. 585 the NLRB correctly found that the communications were cast as a threat of retaliatory action and not as a prediction of "demonstrable economic consequences." P. 619.

No. 585, 397 F. 2d 157, affirmed; Nos. 573 and 691, 398 F. 2d 336, 337, and 339, reversed and remanded.

Dominick L. Manoli argued the cause for petitioner in No. 573. With him on the brief were *Solicitor General Griswold, Peter L. Strauss, Arnold Ordman,* and *Norton J. Come. Albert Gore* argued the cause for petitioner in No. 691. With him on the brief was *Joseph M. Jacobs. Edward J. Simerka* argued the cause for petitioner in No. 585. With him on the brief was *Eugene B. Schwartz.*

John E. Jenkins, Jr., argued the cause and filed briefs for Gissel Packing Co., Inc., respondent in Nos. 573 and 691. *Lewis P. Hamlin, Jr.,* argued the cause and filed a brief for General Steel Products, Inc., et al., respondents in No. 573. *Fred F. Holroyd* argued the cause for Heck's, Inc., respondent in No. 573. With him on the brief was *Charles E. Hurt. Lawrence G. Wallace* argued the cause for respondent in No. 585. On the brief were *Solicitor General Griswold, Dominick L. Manoli,* and *Messrs. Strauss, Ordman,* and *Come.*

Briefs of *amici curiae* in Nos. 573 and 691 were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor & Congress of Industrial Organizations, and by the Associated Builders & Contractors, Inc. Briefs of *amici curiae* in No. 585 were filed by *Lambert H. Miller* for the National Association of Manufacturers; by *Harry L. Browne* for the American Retail Federation; and by *Stanley E. Tobin* for the Mechanical Specialties Co., Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases involve the extent of an employer's duty under the National Labor Relations Act to recognize a union that bases its claim to representative status solely on the possession of union authorization cards, and the steps an employer may take, particularly with regard to the scope and content of statements he may make, in legitimately resisting such card-based recognition. The specific questions facing us here are whether the duty to bargain can arise without a Board election under the Act; whether union authorization cards, if obtained from a majority of employees without misrepresentation or coercion, are reliable enough generally to provide a valid, alternate route to majority status; whether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility; and whether certain specific statements made by an employer to his employees constituted such an election-voiding unfair labor practice and thus fell outside the protection of the First Amendment and § 8 (c) of the Act, 49 Stat. 452, as amended, 29 U. S. C. § 158 (c). For reasons given below, we answer each of these questions in the affirmative.

I.

Of the four cases before us, three—*Gissel Packing Co., Heck's Inc.*, and *General Steel Products, Inc.*—were consolidated following separate decisions in the Court of Appeals for the Fourth Circuit and brought here by the National Labor Relations Board in No. 573. Food Store Employees Union, Local No. 347, the petitioning Union in *Gissel*, brought that case here in a separate petition in No. 691. All three cases present the same legal issues

in similar, uncomplicated factual settings that can be briefly described together. The fourth case, No. 585 (*Sinclair Company*), brought here from the Court of Appeals for the First Circuit and argued separately, presents many of the same questions and will thus be disposed of in this opinion; but because the validity of some of the Board's factual findings are under attack on First Amendment grounds, detailed attention must be paid to the factual setting of that case.

Nos. 573 and 691.

In each of the cases from the Fourth Circuit, the course of action followed by the Union and the employer and the Board's response were similar. In each case, the Union waged an organizational campaign, obtained authorization cards from a majority of employees in the appropriate bargaining unit, and then, on the basis of the cards, demanded recognition by the employer. All three employers refused to bargain on the ground that authorization cards were inherently unreliable indicators of employee desires; and they either embarked on, or continued, vigorous antiunion campaigns that gave rise to numerous unfair labor practice charges. In *Gissel*, where the employer's campaign began almost at the outset of the Union's organizational drive, the Union (petitioner in No. 691), did not seek an election, but instead filed three unfair labor practice charges against the employer, for refusing to bargain in violation of § 8 (a)(5), for coercion and intimidation of employees in violation of § 8 (a)(1), and for discharge of Union adherents in violation of § 8 (a)(3).[1] In *Heck's* an elec-

[1] At the outset of the Union campaign, the Company vice president informed two employees, later discharged, that if they were caught talking to Union men, "you God-damned things will go." Subsequently, the Union presented oral and written demands for recognition, claiming possession of authorization cards from 31

tion sought by the Union was never held because of nearly identical unfair labor practice charges later filed by the Union as a result of the employer's antiunion campaign, initiated after the Union's recognition demand.[2]

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of the 47 employees in the appropriate unit. Rejecting the bargaining demand, the Company began to interrogate employees as to their Union activities; to promise them better benefits than the Union could offer; and to warn them that if the "union got in, [the vice president] would just take his money and let the union run the place," that the Union was not going to get in, and that it would have to "fight" the Company first. Further, when the Company learned of an impending Union meeting, it arranged, so the Board later found, to have an agent present to report the identity of the Union's adherents. On the first day following the meeting, the vice president told the two employees referred to above that he knew they had gone to the meeting and that their work hours were henceforth reduced to half a day. Three hours later, the two employees were discharged.

[2] The organizing drive was initiated by the employees themselves at Heck's Charleston warehouses. The Union first demanded recognition on the basis of 13 cards from 26 employees of the Company's three Charleston warehouses. After responding "No comment" to the Union's repeated requests for recognition, the president assembled the employees and told them of his shock at their selection of the Union; he singled out one of the employees to ask if he had signed an authorization card. The next day the Union obtained the additional card necessary to establish a majority. That same day, the leading Union supporter (the employee who had first established contacts with the Union and had solicited a large number of the cards) was discharged, and another employee was interrogated as to his Union activities, encouraged to withdraw his authorization, and warned that a Union victory could result in reduced hours, fewer raises, and withdrawal of bonuses. A second demand for recognition was made two days later, and thereafter the president summoned two known Union supporters to his office and offered them new jobs at higher pay if they would use their influence to "break up the union."

The same pattern was repeated a year later at the Company's Ashland, Kentucky, store, where the Union obtained cards from 21 of the 38 employees by October 5, 1965. The next day, the

And in *General Steel*, an election petitioned for by the Union and won by the employer was set aside by the Board because of the unfair labor practices committed by the employer in the pre-election period.[3]

In each case, the Board's primary response was an order to bargain directed at the employers, despite the absence of an election in *Gissel* and *Heck's* and the employer's victory in *General Steel*. More specifically, the Board found in each case (1) that the Union had obtained

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assistant store manager told an employee that he knew that the Union had acquired majority status. When the Union requested recognition on October 8, however, the Company refused on the ground that it was not sure whether department heads were included in the bargaining unit—even though the cards represented a majority with or without the department heads. After a second request for recognition and an offer to submit the cards to the employer for verification, respondent again refused, on grounds of uncertainty about the definition of the unit and because a poll taken by the Company showed that a majority of the employees did not want Union representation. Meanwhile, the Company told the employees that an employee of another company store had been fired on the spot for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for Union representation without giving them assurances against reprisals.

[3] Throughout the Union's six-month organizational campaign—both before and after its demand for recognition based on possession of cards from 120 of the 207 employees in the appropriate unit—the Company's foremen and supervisors interrogated employees about their Union involvement; threatened them with discharge for engaging in Union activities or voting for the Union; suggested that unionization might hurt business and make new jobs more difficult to obtain; warned that strikes and other dire economic consequences would result (a supervisor informed a group of employees that if the Union came in, "a nigger would be the head of it," and that when the Company put in 10 new machines, "the niggers would be the operators of them"); and asserted that, although the Company would have to negotiate with the Union, it could negotiate endlessly and would not have to sign anything.

valid authorization cards[4] from a majority of the employees in the bargaining unit and was thus entitled to represent the employees for collective bargaining purposes; and (2) that the employer's refusal to bargain with the Union in violation of § 8 (a)(5) was motivated, not by a "good faith" doubt of the Union's majority status, but by a desire to gain time to dissipate that status. The Board based its conclusion as to the lack of good faith doubt on the fact that the employers had committed substantial unfair labor practices during their antiunion campaign efforts to resist recognition. Thus, the Board found that all three employers had engaged in restraint and coercion of employees in violation of § 8 (a)(1)—in *Gissel*, for coercively interrogating employees about Union activities, threatening them with discharge, and promising them benefits; in *Heck's*, for coercively interrogating employees, threatening reprisals, creating the appearance of surveillance, and offering benefits for opposing the Union; and in *General Steel*, for coercive interrogation and threats of reprisals, including discharge. In addition, the Board found that the employers in *Gissel* and *Heck's* had wrongfully discharged employees for engaging in Union activities in violation of § 8 (a)(3). And, because the employers had rejected

[4] The cards used in all four campaigns in Nos. 573 and 691 and in the one drive in No. 585 unambiguously authorized the Union to represent the signing employee for collective bargaining purposes; there was no reference to elections. Typical of the cards was the one used in the Charleston campaign in *Heck's*, and it stated in relevant part:

"Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment."

the card-based bargaining demand in bad faith, the Board found that all three had refused to recognize the Unions in violation of § 8 (a)(5).

Only in *General Steel* was there any objection by an employer to the validity of the cards and the manner in which they had been solicited, and the doubt raised by the evidence was resolved in the following manner. The customary approach of the Board in dealing with allegations of misrepresentation by the Union and misunderstanding by the employees of the purpose for which the cards were being solicited has been set out in *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963) and reaffirmed in *Levi Strauss & Co.*, 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338 (1968). Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (*i. e.*, states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election. In *General Steel*, the trial examiner considered the allegations of misrepresentation at length and, applying the Board's customary analysis, rejected the claims with findings that were adopted by the Board and are reprinted in the margin.[5]

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[5] "Accordingly, I reject Respondent's contention 'that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that this is the absolute equivalent of telling him that it will be used "only" for purposes of obtaining an election.'

. . . . .

"With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even

Consequently, the Board ordered the companies to cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the Unions on request, and to post the appropriate notices.

On appeal, the Court of Appeals for the Fourth Circuit, in *per curiam* opinions in each of the three cases (398 F. 2d 336, 337, 339), sustained the Board's findings as to the §§ 8 (a)(1) and (3) violations, but rejected the Board's findings that the employers' refusal to bargain violated § 8 (a)(5) and declined to enforce those portions of the Board's orders directing the respondent companies to bargain in good faith. The court based its § 8 (a)(5) rulings on its 1967 decisions raising the same fundamental issues, *Crawford Mfg. Co.* v. *NLRB*, 386 F. 2d 367, cert. denied, 390 U. S. 1028 (1968); *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562; *NLRB* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551. The court in those cases held that the 1947 Taft-Hartley amendments to the Act, which permitted the Board to resolve representation disputes by certification under § 9 (c) only by secret ballot election, withdrew from the Board the authority to order an employer to bargain under § 8 (a)(5) on the basis of cards, in the absence of NLRB certification, unless the employer knows independently of the cards that there is in fact no representation dispute. The court held that the cards themselves were so inherently unreliable that their use gave an employer virtually an automatic, good faith claim

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though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face."

that such a dispute existed, for which a secret election was necessary. Thus, these rulings established that a company could not be ordered to bargain unless (1) there was no question about a Union's majority status (either because the employer agreed the cards were valid or had conducted his own poll so indicating), or (2) the employer's §§ 8 (a)(1) and (3) unfair labor practices committed during the representation campaign were so extensive and pervasive that a bargaining order was the only available Board remedy irrespective of a card majority.

Thus based on the earlier decisions, the court's reasoning in these cases was brief, as indicated by the representative holding in *Heck's:*

> "We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after the Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions. This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8 (a)(1). It is controlled by our recent decisions and their reasoning. . . . There was not substantial evidence to support the findings of the Board that Heck's, Inc. had no good faith doubt of the unions' claims of majorities." 398 F. 2d, at 338–339.

No. 585.

In No. 585, the factual pattern was quite similar. The petitioner, a producer of mill rolls, wire, and related products at two plants in Holyoke, Massachusetts, was shut down for some three months in 1952 as the result of a strike over contract negotiations with the American Wire Weavers Protective Association, the representative of petitioner's journeymen and apprentice wire weavers from 1933 to 1952. The Company subsequently reopened without a union contract, and its employees remained unrepresented through 1964, when the Company was acquired by an Ohio corporation, with the Company's former president continuing as head of the Holyoke, Massachusetts, division. In July 1965, the International Brotherhood of Teamsters, Local Union No. 404, began an organizing campaign among petitioner's Holyoke employees and by the end of the summer had obtained authorization cards from 11 of the Company's 14 journeymen wire weavers choosing the Union as their bargaining agent. On September 20, the Union notified petitioner that it represented a majority of its wire weavers, requested that the Company bargain with it, and offered to submit the signed cards to a neutral third party for authentication. After petitioner's president declined the Union's request a week later, claiming, *inter alia*, that he had a good faith doubt of majority status because of the cards' inherent unreliability, the Union petitioned, on November 8, for an election that was ultimately set for December 9.

When petitioner's president first learned of the Union's drive in July, he talked with all of his employees in an effort to dissuade them from joining a union. He particularly emphasized the results of the long 1952 strike, which he claimed "almost put our company out of busi-

ness," and expressed worry that the employees were forgetting the "lessons of the past." He emphasized, secondly, that the Company was still on "thin ice" financially, that the Union's "only weapon is to strike," and that a strike "could lead to the closing of the plant," since the parent company had ample manufacturing facilities elsewhere. He noted, thirdly, that because of their age and the limited usefulness of their skills outside their craft, the employees might not be able to find re-employment if they lost their jobs as a result of a strike. Finally, he warned those who did not believe that the plant could go out of business to "look around Holyoke and see a lot of them out of business." The president sent letters to the same effect to the employees in early November, emphasizing that the parent company had no reason to stay in Massachusetts if profits went down.

During the two or three weeks immediately prior to the election on December 9, the president sent the employees a pamphlet captioned: "Do you want another 13-week strike?" stating, *inter alia*, that: "We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. . . . The Teamsters Union is a strike happy outfit." Similar communications followed in late November, including one stressing the Teamsters' "hoodlum control." Two days before the election, the Company sent out another pamphlet that was entitled: "Let's Look at the Record," and that purported to be an obituary of companies in the Holyoke-Springfield, Massachusetts, area that had allegedly gone out of business because of union demands, eliminating some 3,500 jobs; the first page carried a large cartoon showing the preparation of a grave for the Sinclair Company and other headstones containing the names of other plants allegedly victimized by the unions. Finally, on the day before

the election, the president made another personal appeal to his employees to reject the Union. He repeated that the Company's financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make re-employment difficult. The Union lost the election 7–6, and then filed both objections to the election and unfair labor practice charges which were consolidated for hearing before the trial examiner.

The Board agreed with the trial examiner that the president's communications with his employees, when considered as a whole, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers." Thus, the Board found that under the "totality of the circumstances" petitioner's activities constituted a violation of § 8 (a)(1) of the Act. The Board further agreed with the trial examiner that petitioner's activities, because they "also interfered with the exercise of a free and untrammeled choice in the election," and "tended to foreclose the possibility" of holding a fair election, required that the election be set aside. The Board also found that the Union had a valid card majority (the unambiguous cards, see n. 4, *supra*, went unchallenged) when it demanded recognition initially and that the Company declined recognition, not because of a good faith doubt as to the majority status, but, as the § 8 (a)(1) violations indicated, in order to gain time to dissipate that status—in violation of § 8 (a)(5). Consequently, the Board set the election aside, entered a cease-and-desist order, and ordered the Company to bargain on request.

On appeal, the Court of Appeals for the First Circuit sustained the Board's findings and conclusions and en-

forced its order in full. 397 F. 2d 157. The court rejected the Company's proposition that the inherent unreliability of authorization cards entitled an employer automatically to insist on an election, noting that the representative status of a union may be shown by means other than an election; the court thus reaffirmed its stance among those circuits disavowing the Fourth Circuit's approach to authorization cards.[6] Because of the conflict among the circuits on the card issues and because of the alleged conflict between First Amendment freedoms and the restrictions placed on employer speech by § 8 (a)(1) in *Sinclair*, No. 585, we granted certiorari to consider both questions. 393 U. S. 997 (1968). For reasons given below, we reverse the decisions of the Court of Appeals for the Fourth Circuit and affirm the ruling of the Court of Appeals for the First Circuit.

II.

In urging us to reverse the Fourth Circuit and to affirm the First Circuit, the National Labor Relations

[6] See, *e. g.*, *Joy Silk Mills, Inc.* v. *NLRB*, 87 U. S. App. D. C. 360, 185 F. 2d 732 (1950), cert. denied, 341 U. S. 914 (1951); *NLRB* v. *Gotham Shoe Mfg. Co., Inc.*, 359 F. 2d 684 (C. A. 2d Cir. 1966); *NLRB* v. *Quality Markets, Inc.*, 387 F. 2d 20 (C. A. 3d Cir. 1967); *NLRB* v. *Phil-Modes, Inc.*, 396 F. 2d 131 (C. A. 5th Cir. 1968); *Atlas Engine Works, Inc.* v. *NLRB*, 396 F. 2d 775 (C. A. 6th Cir. 1968), petition for certiorari pending; *NLRB* v. *Clark Products, Inc.*, 385 F. 2d 396 (C. A. 7th Cir. 1967); *NLRB* v. *Ralph Printing & Lithographing Co.*, 379 F. 2d 687 (C. A. 8th Cir. 1967); *NLRB* v. *Luisi Truck Lines*, 384 F. 2d 842 (C. A. 9th Cir. 1967); *Furr's, Inc.* v. *NLRB*, 381 F. 2d 562 (C. A. 10th Cir.), cert. denied, 389 U. S. 840 (1967).

In addition to the First Circuit below, four courts of appeals have subsequently considered the Fourth Circuit's view of the cards and specifically rejected it. *NLRB* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 836, n. 10 (C. A. 2d Cir. 1968); *NLRB* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712–713 (C. A. 5th Cir. 1968); *NLRB* v. *Atco-Surgical Supports*, 394 F. 2d 659, 660 (C. A. 6th Cir. 1968); *NLRB* v. *Ozark Motor Lines*, 403 F. 2d 356 (C. A. 8th Cir. 1968).

Board contends that we should approve its interpretation and administration of the duties and obligations imposed by the Act in authorization card cases. The Board argues (1) that unions have never been limited under § 9 (c) of either the Wagner Act or the 1947 amendments to certified elections as the sole route to attaining representative status. Unions may, the Board contends, impose a duty to bargain on the employer under § 8 (a)(5) by reliance on other evidence of majority employee support, such as authorization cards. Contrary to the Fourth Circuit's holding, the Board asserts, the 1947 amendments did not eliminate the alternative routes to majority status. The Board contends (2) that the cards themselves, when solicited in accordance with Board standards which adequately insure against union misrepresentation, are sufficiently reliable indicators of employee desires to support a bargaining order against an employer who refuses to recognize a card majority in violation of § 8 (a)(5). The Board argues (3) that a bargaining order is the appropriate remedy for the § 8 (a)(5) violation, where the employer commits other unfair labor practices that tend to undermine union support and render a fair election improbable.

Relying on these three assertions, the Board asks us to approve its current practice, which is briefly as follows. When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9 (c)(1)(B). If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy

for the various violations. A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or coercion or if the employer's unfair labor practices are unrelated generally to the representation campaign. Conversely, the employers in these cases urge us to adopt the views of the Fourth Circuit.

There is more at issue in these cases than the dispute outlined above between the Board and the four employers, however, for the Union, petitioner in No. 691, argues that we should accord a far greater role to cards in the bargaining area than the Board itself seeks in this litigation. In order to understand the differences between the Union and the Board, it is necessary to trace the evolution of the Board's approach to authorization cards from its early practice to the position it takes on oral argument before this Court. Such an analysis requires viewing the Board's treatment of authorization cards in three separate phases: (1) under the *Joy Silk* doctrine, (2) under the rules of the *Aaron Brothers* case, and (3) under the approach announced at oral argument before this Court.

The traditional approach utilized by the Board for many years has been known as the *Joy Silk* doctrine. *Joy Silk Mills, Inc.*, 85 N. L. R. B. 1263 (1949), enforced, 87 U. S. App. D. C. 360, 185 F. 2d 732 (1950). Under that rule, an employer could lawfully refuse to bargain with a union claiming representative status through possession of authorization cards if he had a "good faith doubt" as to the union's majority status; instead of bargaining, he could insist that the union seek an election in order to test out his doubts. The Board, then, could find a lack of good faith doubt and enter a bargaining order in one of two ways. It could find (1) that the employer's independent unfair labor practices were evidence of bad faith, showing that the employer was seeking time to dissipate the union's

majority. Or the Board could find (2) that the employer had come forward with no reasons for entertaining any doubt and therefore that he must have rejected the bargaining demand in bad faith. An example of the second category was *Snow & Sons,* 134 N. L. R. B. 709 (1961), enforced, 308 F. 2d 687 (C. A. 9th Cir. 1962), where the employer reneged on his agreement to bargain after a third party checked the validity of the card signatures and insisted on an election because he doubted that the employees truly desired representation. The Board entered a bargaining order with very broad language to the effect that an employer could not refuse a bargaining demand and seek an election instead "without a valid ground therefor," 134 N. L. R. B., at 710–711. See also *Dixon Ford Shoe Co., Inc.,* 150 N. L. R. B. 861 (1965); *Kellogg Mills,* 147 N. L. R. B. 342, 346 (1964), enforced, 347 F. 2d 219 (C. A. 9th Cir. 1965).

The leading case codifying modifications to the *Joy Silk* doctrine was *Aaron Brothers,* 158 N. L. R. B. 1077 (1966). There the Board made it clear that it had shifted the burden to the General Counsel to show bad faith and that an employer "will not be held to have violated his bargaining obligation . . . simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority." 158 N. L. R. B., at 1078. Two significant consequences were emphasized. The Board noted (1) that not every unfair labor practice would automatically result in a finding of bad faith and therefore a bargaining order; the Board implied that it would find bad faith only if the unfair labor practice was serious enough to have the tendency to dissipate the union's majority. The Board noted (2) that an employer no longer needed to come forward with reasons for rejecting a bargaining demand. The Board pointed out, however, that a bargaining order would issue if it could prove that an employer's "course of conduct"

gave indications as to the employer's bad faith. As examples of such a "course of conduct," the Board cited *Snow & Sons, supra; Dixon Ford Shoe Co., Inc., supra,* and *Kellogg Mills, supra,* thereby reaffirming *John P. Serpa, Inc.,* 155 N. L. R. B. 99 (1965), where the Board had limited *Snow & Sons* to its facts.

Although the Board's brief before this Court generally followed the approach as set out in *Aaron Brothers, supra,* the Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew,* through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

The Union argues here that an employer's right to insist on an election in the absence of unfair labor practices should be more circumscribed, and a union's right to rely on cards correspondingly more expanded, than the Board would have us rule. The Union's contention is that an employer, when confronted with a card-based bargaining demand, can insist on an election only by filing the election petition himself immediately under

§ 9 (c)(1)(B) and not by insisting that the Union file the election petition, whereby the election can be subjected to considerable delay. If the employer does not himself petition for an election, the Union argues, he must recognize the Union regardless of his good or bad faith and regardless of his other unfair labor practices, and should be ordered to bargain if the cards were in fact validly obtained. And if this Court should continue to utilize the good faith doubt rule, the Union contends that at the least we should put the burden on the employer to make an affirmative showing of his reasons for entertaining such doubt.

Because the employers' refusal to bargain in each of these cases was accompanied by independent unfair labor practices which tend to preclude the holding of a fair election, we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes.

With the Union's arguments aside, the points of difference between the employers and the Board will be considered in the following manner. The validity of the cards under the Act, their intrinsic reliability, and the appropriateness of a bargaining order as a response to violations of § 8 (a)(5) as well as §§ 8 (a)(1) and (3) will be discussed in the next section. The nature of an employer's reaction to an organizational campaign, and particularly the Board's conclusion that the employer's statements in No. 585 contained threats of reprisal and thus constituted restraint and coercion in violation of § 8 (a)(1) and not protected speech, will be covered in the final section.

III.

A.

The first issue facing us is whether a union can establish a bargaining obligation by means other than a Board election and whether the validity of alternate routes to

majority status, such as cards, was affected by the 1947 Taft-Hartley amendments. The most commonly traveled[7] route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9 (c) of the Act (29 U. S. C. § 159 (c)); it is also, from the Board's point of view, the preferred route.[8] A union is not limited to a Board election, however, for, in addition to § 9, the present Act provides in § 8 (a)(5) (29 U. S. C. § 158 (a)(5)), as did the Wagner Act in § 8 (5), that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." Since § 9 (a), in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."[9] Almost from the inception of the Act,

[7] In 1967, for instance, the Board conducted 8,116 elections but issued only 157 bargaining orders based on a card majority. *Levi Strauss & Co.*, 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338, 1342, n. 9 (1968). See also Sheinkman, Recognition of Unions Through Authorization Cards, 3 Ga. L. Rev. 319 (1969). The number of card cases that year, however, represents a rather dramatic increase over previous years, from 12 such cases in 1964, 24 in 1965, and about 117 in 1966. Browne, Obligation to Bargain on Basis of Card Majority, 3 Ga. L. Rev. 334, 347 (1969).

[8] See, *e. g.*, *Aaron Brothers*, 158 N. L. R. B. 1077 (1966); cf., *General Shoe Corp.*, 77 N. L. R. B. 124 (1948). An employer, of course, may not, even if he acts in good faith, recognize a minority union, *Garment Workers' Union* v. *NLRB*, 366 U. S. 731 (1961).

[9] *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C. A. 2d Cir. 1940).

then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8 (a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote,[10] or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[11]

We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. See, *e. g.*, *NLRB* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340 (1940); *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702 (1944); *United Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62 (1956). Thus, in *United Mine Workers, supra,* we noted that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status," 351 U. S., at 72, n. 8, since § 9 (a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen," 351 U. S., at 71. We therefore pointed out in that case, where the union had obtained signed authorization cards from a majority of the employees, that "[i]n the absence of any bona fide dispute[12] as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated

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[10] See, *e. g.*, *Denver Auto Dealers Assn.*, 10 N. L. R. B. 1173 (1939); *Century Mills, Inc.*, 5 N. L. R. B. 807 (1938).

[11] The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the administration of the Act, see *NLRB* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C. A. 2d Cir.), cert. denied, 304 U. S. 576 (1938).

[12] See n. 11, *supra.*

§ 8 (a)(5) of the Act." 351 U. S., at 69. We see no reason to reject this approach to bargaining obligations now, and we find unpersuasive the Fourth Circuit's view that the 1947 Taft-Hartley amendments, enacted some nine years before our decision in *United Mine Workers, supra,* require us to disregard that case. Indeed, the 1947 amendments weaken rather than strengthen the position taken by the employers here and the Fourth Circuit below. An early version of the bill in the House would have amended § 8 (5) of the Wagner Act to permit the Board to find a refusal-to-bargain violation only where an employer had failed to bargain with a union "currently recognized by the employer or certified as such [through an election] under section 9." Section 8 (a)(5) of H. R. 3020, 80th Cong., 1st Sess. (1947). The proposed change, which would have eliminated the use of cards, was rejected in Conference (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)), however, and we cannot make a similar change in the Act simply because, as the employers assert, Congress did not expressly approve the use of cards in rejecting the House amendment. Nor can we accept the Fourth Circuit's conclusion that the change was wrought when Congress amended § 9 (c) to make election the sole basis for *certification* by eliminating the phrase "any other suitable method to ascertain such representatives," [13] under which the Board had occasionally used cards as a certification basis. A certified union has the benefit of numerous special privileges

[13] Section 9 (c) of the Wagner Act had provided:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify . . . the name or names of the representatives that have been designated or selected. In any such investigation, the Board . . . may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

which are not accorded unions recognized voluntarily or under a bargaining order[14] and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election.

The employers rely finally on the addition to § 9 (c) of subparagraph (B), which allows an employer to petition for an election whenever "one or more individuals or labor organizations have presented to him a claim[15] to be recognized as the representative defined in section 9 (a)." That provision was not added, as the employers assert, to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity.[16] We

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[14] *E. g.*, protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (§ 9 (c) (3)), protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority (see *Brooks* v. *NLRB*, 348 U. S. 96 (1954)), protection against recognitional picketing by rival unions (§ 8 (b) (4) (C)), and freedom from the restrictions placed in work assignments disputes by § 8 (b) (4) (D), and on recognitional and organizational picketing by § 8 (b) (7).

[15] Under the Wagner Act, which did not prescribe who would file election petitions, the Board had ruled that an employer could seek an election only when two unions presented conflicting bargaining requests on the ground that if he were given the same election petition rights as the union, he could interrupt union drives by demanding an election before the union had obtained majority status. The 1947 amendments resolved the difficulty by providing that an employer could seek an election only after he had been requested to bargain. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 35 (1947).

[16] The Senate report stated that the "present Board rules . . . discriminate against employers who have reasonable grounds for

agree with the Board's assertion here that there is no suggestion that Congress intended § 9 (c)(1)(B) to relieve any employer of his § 8 (a)(5) bargaining obligation where, without good faith, he engaged in unfair labor practices disruptive of the Board's election machinery. And we agree that the policies reflected in § 9 (c)(1)(B) fully support the Board's present administration of the Act (see *supra*, at 591–592); for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages "in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election." Brief for Petitioner, the Board, in No. 573, p. 36.

In short, we hold that the 1947 amendments did not restrict an employer's duty to bargain under § 8 (a)(5) solely to those unions whose representative status is certified after a Board election.[17]

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believing that labor organizations claiming to represent their employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess., 10 (1947). Senator Taft stated during the debates:

"Today an employer is faced with this situation. A man comes into his office and says, 'I represent your employees. Sign this agreement, or we strike tomorrow.' . . . The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board . . . and say, 'I want an election. I want to know who is the bargaining agent for my employees.'" 93 Cong. Rec. 3838 (1947).

[17] As aptly stated in Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, 861–862 (1967):

"Cards have been used under the act for thirty years; [this] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley Bill to amend section 8 (a)(5) . . . was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drum-beating should be permitted to overcome, without legislation, this history."

B.

We next consider the question whether authorization cards are such inherently unreliable indicators of employee desires that, whatever the validity of other alternate routes to representative status, the cards themselves may never be used to determine a union's majority and to support an order to bargain. In this context, the employers urge us to take the step the 1947 amendments and their legislative history indicate Congress did not take, namely, to rule out completely the use of cards in the bargaining arena. Even if we do not unhesitatingly accept the Fourth Circuit's view in the matter, the employers argue, at the very least we should overrule the *Cumberland Shoe* doctrine (see *supra*, at 584) and establish stricter controls over the solicitation of the cards by union representatives.[18]

[18] In dealing with the reliability of cards, we should re-emphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the "laboratory conditions" of that election. We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside.

The objections to the use of cards voiced by the employers and the Fourth Circuit boil down to two contentions:[19] (1) that, as contrasted with the election procedure,[20] the cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth; and (2) that quite apart from the election comparison, the cards are too often obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process. Neither contention is persuasive, and each proves too much. The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.[21] The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice. As for misrepresentation, in any specific case of

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[19] The Board's reliance on authorization cards has provoked considerable scholarly controversy. Compare criticism of Board policy, particularly its treatment of ambiguous, dual-purpose cards, in Browne, *supra*, n. 7, and Comment, Union Authorization Cards, 75 Yale L. J. 805 (1966), with defense of Board practice in Lesnick, *supra*, n. 17; Welles, The Obligation to Bargain on the Basis of a Card Majority, 3 Ga. L. Rev. 349 (1969); and Comment, Union Authorization Cards: A Reliable Basis for an NLRB Order To Bargain?, 47 Texas L. Rev. 87 (1968).

[20] For a comparison of the card procedure and the election process, see discussion in *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562, 564–566 (C. A. 4th Cir. 1967).

[21] See nn. 7–8, *supra*.

alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards (to be discussed more fully below) and rule that there was no majority if the standards were not satisfied. It does not follow that because there are some instances of irregularity, the cards can never be used; otherwise, an employer could put off his bargaining obligation indefinitely through continuing interference with elections.

That the cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded, needs no extended discussion, for the employers' contentions cannot withstand close examination. The employers argue that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues. Normally, however, the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act; the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful. See, *e. g., Hunt Oil Co.*, 157 N. L. R. B. 282 (1966); *Don Swart Trucking Co.*, 154 N. L. R. B. 1345 (1965). Thus, in all of the cases here but the Charleston campaign in *Heck's* the employer, whether informed by the union or not, was aware of the union's organizing drive almost at the outset and began its antiunion campaign at that time; and even in the *Heck's* Charleston case, where the recognition demand came about a week after the solicitation began, the employer was able to deliver a speech before the union obtained a majority. Further, the employers argue that without a secret ballot an employee may, in

a card drive, succumb to group pressures or sign simply to get the union "off his back" and then be unable to change his mind as he would be free to do once inside a voting booth. But the same pressures are likely to be equally present in an election, for election cases arise most often with small bargaining units [22] where virtually every voter's sentiments can be carefully and individually canvassed. And no voter, of course, can change his mind after casting a ballot in an election even though he may think better of his choice shortly thereafter.

The employers' second complaint, that the cards are too often obtained through misrepresentation and coercion, must be rejected also in view of the Board's present rules for controlling card solicitation, which we view as adequate to the task where the cards involved state their purpose clearly and unambiguously on their face. We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue. And we would be equally blind if we did not recognize that various courts of appeals and commentators [23] have differed significantly as to the effectiveness of the Board's *Cumberland Shoe* doctrine (see *supra*, at 584) to cure such abuses.

Thus, even where the cards are unambiguous on their face, both the Second Circuit (*NLRB* v. *S. E. Nichols Co.*, 380 F. 2d 438 (1967)) and the Fifth Circuit (*Engineers & Fabricators, Inc.* v. *NLRB*, 376 F. 2d 482 (1967)) have joined the Fourth Circuit below

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[22] See Comment, Union Authorization Cards: A Reliable Basis for an NLRB Order To Bargain?, *supra*, at 94 and n. 32.

[23] See n. 19, *supra*.

in rejecting the Board's rule that the cards will be counted unless the solicitor's statements amounted under the circumstances to an assurance that the cards would be used only for an election, or for no other purpose than an election. And even those circuits which have adopted the Board's approach have criticized the Board for tending too often to apply the *Cumberland* rule too mechanically, declining occasionally to uphold the Board's application of its own rule in a given case. See, *e. g., NLRB* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (C. A. 1st Cir. 1967); *NLRB* v. *Sandy's Stores, Inc.*, 398 F. 2d 268 (C. A. 1st Cir. 1968); *NLRB* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (C. A. 6th Cir. 1967); *NLRB* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (C. A. 7th Cir. 1968); *Furr's, Inc.* v. *NLRB*, 381 F. 2d 562 (C. A. 10th Cir. 1967); *UAW* v. *NLRB*, 129 U. S. App. D. C. 196, 392 F. 2d 801 (1967). Among those which reject the *Cumberland* rule, the Fifth Circuit agrees with the Second Circuit (see *S. E. Nichols Co., supra*), that a card will be vitiated if an employee was left with the impression that he would be able to resolve any lingering doubts and make a final decision in an election, and further requires that the Board probe the subjective intent of each signer, an inquiry expressly avoided by *Cumberland*. See *NLRB* v. *Southland Paint Co.*, 394 F. 2d 717, 728, 730 (C. A. 5th Cir. 1968); *Engineers & Fabricators, Inc.* v. *NLRB, supra*. Where the cards are ambiguous on their face, the Fifth Circuit, joined by the Eighth Circuit (see, *e. g., NLRB* v. *Peterson Bros.*, 342 F. 2d 221 (C. A. 5th Cir. 1965), and *Bauer Welding & Metal Fabricators, Inc.* v. *NLRB*, 358 F. 2d 766 (C. A. 8th Cir. 1966)), departs still further from the Board rule. And there is a conflict among those courts which otherwise follow the Board as to single-purpose cards (compare *NLRB* v. *Lenz Co.*, 396 F. 2d 905, 908 (C. A. 6th Cir. 1968), with *NLRB* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C. A. 7th Cir. 1966)).

We need make no decision as to the conflicting approaches used with regard to dual-purpose cards, for in each of the five organization campaigns in the four cases before us the cards used were single-purpose cards, stating clearly and unambiguously on their face that the signer designated the union as his representative. And even the view forcefully voiced by the Fourth Circuit below that unambiguous cards as well present too many opportunities for misrepresentation comes before us somewhat weakened in view of the fact that there were no allegations of irregularities in four of those five campaigns (*Gissel*, the two *Heck's* campaigns,[24] and *Sinclair*). Only in *General Steel* did the employer challenge the cards on the basis of misrepresentations. There, the trial examiner, after hearing testimony from over 100 employees and applying the traditional Board approach (see n. 5, *supra*), concluded that "all of these employees not only intended, but were fully aware, that they were thereby designating the Union as their representative." Thus, the sole question before us, raised in only one of the four cases here, is whether the *Cumberland Shoe* doctrine is an adequate rule under the Act for assuring employee free choice.

In resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee

[24] In the Charleston campaign in *Heck's*, the employees handled the card drive themselves from beginning to end, contacting the union, obtaining the blank authorization cards, and soliciting their fellow employees on that basis; no union agents were involved in the card signing.

a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% [25] of the employees when an employer rejects a bargaining demand and insists that the union seek an election. We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else. In addition to approving the use of cards, of course, Congress has expressly authorized reliance on employee signatures alone in other areas of labor relations, even where criminal sanctions hang in the balance,[26] and we should not act hastily in disregarding congressional judgments that employees can be counted on to take responsibility for their acts.

We agree, however, with the Board's own warnings in *Levi Strauss & Co.*, 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by

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[25] See 1969 CCH Guidebook to Labor Relations ¶ 402.4.

[26] Criminal sanctions are imposed by § 302 (29 U. S. C. § 186) which makes it unlawful for an employer to pay to and for a union representative to receive "any money or other thing of value." Section 302 (c)(4) (29 U. S. C. § 186 (c)(4)) exempts payments by employers to union representatives of union dues, however, where an employee has executed a "written assignment" of the dues, *i. e.*, a check-off authorization. Signatures are also relied on in § 9 (c)(1)(A) (29 U. S. C. § 159 (c)(1)(A)), which provides for Board processing of representation and decertification petitions when each is supported by a "substantial number of employees" (the basis for the 30% signature requirement, see n. 25, *supra*), and in § 9 (e) which specifically provides for 30% of the signatures in the bargaining unit to empower the Board to hold a union shop de-authorization election.

a too easy mechanical application of the *Cumberland* rule.[27] We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8 (a)(1).[28] We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry. We nevertheless feel that the trial examiner's findings in *General Steel* (see n. 5, *supra*) represent the limits of the *Cumberland* rule's application. We emphasize that the Board should be careful to guard

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[27] In explaining and reaffirming the *Cumberland Shoe* doctrine in the context of unambiguous cards, the Board stated:

"Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose . . . ."

The Board stated further in a footnote:

"The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in *haec verba* that the 'sole' or 'only' purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to substance rather than to form. It is not the use or nonuse of certain key or 'magic' words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election." 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338, 1341–1342, and n. 7.

[28] See Sheinkman, *supra*, n. 7, at 332–333.

against an approach any more rigid than that in *General Steel*. And we reiterate that nothing we say here indicates our approval of the *Cumberland Shoe* rule when applied to ambiguous, dual-purpose cards.

The employers argue as a final reason for rejecting the use of the cards that they are faced with a Hobson's choice [29] under current Board rules and will almost inevitably come out the loser. They contend that if they do not make an immediate, personal investigation into possible solicitation irregularities to determine whether in fact the union represents an uncoerced majority, they will have unlawfully refused to bargain for failure to have a good faith doubt of the union's majority; and if they do make such an investigation, their efforts at polling and interrogation will constitute an unfair labor practice in violation of § 8 (a)(1) and they will again be ordered to bargain. As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. See *Aaron Brothers*, 158 N. L. R. B. 1077, 1078. If he does make an investigation, the Board's recent cases indicate that reasonable polling in this regard will not always be termed violative of § 8 (a)(1) if conducted in accordance with the requirements set out in *Struksnes Construction Co.*, 165 N. L. R. B. No. 102, 65 L. R. R. M. 1385 (1967). And even if an employer's limited interrogation is found violative of the Act, it might not be serious enough to call for a bargaining order. See *Aaron Brothers, supra; Hammond & Irving, Inc.*, 154 N. L. R. B. 1071

[29] See Judge Brown's "Scylla and Charybdis" analogy in *NLRB* v. *Dan River Mills*, 274 F. 2d 381, 388 (C. A. 5th Cir. 1960).

(1965). As noted above, the Board has emphasized that not "any employer conduct found violative of Section 8 (a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding," *Aaron Brothers, supra,* at 1079.

C.

Remaining before us is the propriety of a bargaining order as a remedy for a § 8 (a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside. We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB* v. *Katz,* 369 U. S. 736, 748, n. 16 (1962); *NLRB* v. *P. Lorillard Co.,* 314 U. S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co.* v. *NLRB,* 321 U. S. 702 (1944). We see no reason now to withdraw this authority from the Board. If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," *Franks Bros., supra,* at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation

to bargain;[30] and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires.[31]

The employers argue that the Board has ample remedies, over and above the cease-and-desist order, to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees, to read

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[30] The Board indicates here that its records show that in the period between January and June 1968, the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 388 days. But the employer can do more than just put off his bargaining obligation by seeking to slow down the Board's administrative processes. He can also affect the outcome of a rerun election by delaying tactics, for figures show that the longer the time between a tainted election and a rerun, the less are the union's chances of reversing the outcome of the first election. See n. 31, *infra*.

[31] A study of 20,153 elections held between 1960 and 1962 shows that in the 267 cases where rerun elections were held over 30% were won by the party who caused the election to be set aside. See Pollitt, NLRB Re-Run Elections: A Study, 41 N. C. L. Rev. 209, 212 (1963). The study shows further that certain unfair labor practices are more effective to destroy election conditions for a longer period of time than others. For instance, in cases involving threats to close or transfer plant operations, the union won the rerun only 29% of the time, while threats to eliminate benefits or refuse to deal with the union if elected seemed less irremediable with the union winning the rerun 75% of the time. *Id.*, at 215–216. Finally, time appears to be a factor. The figures suggest that if a rerun is held too soon after the election before the effects of the unfair labor practices have worn off, or too long after the election when interest in the union may have waned, the chances for a changed result occurring are not as good as they are if the rerun is held sometime in between those periods. Thus, the study showed that if the rerun is held within 30 days of the election or over nine months after, the chances that a different result will occur are only one in five; when the rerun is held within 30–60 days after the election, the chances for a changed result are two in five. *Id.*, at 221.

notices to employees during plant time and to give the union access to employees during working time at the plant, or it can seek a court injunctive order under § 10 (j) (29 U. S. C. § 160 (j)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' § 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage [32] as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[33]

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[32] The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." *NLRB* v. *Logan Packing Co.*, 386 F. 2d, at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10 (c) of the Act (29 U. S. C. § 160 (c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo* v. *FMC*, 383 U. S. 607, 621 (1966).

[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. See Lesnick, *supra*, n. 17, at 862. Any

There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." *Frank Bros., supra,* at 705–706.

Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into such a determination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices.

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effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 135 (1964).

Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562, 570 (C. A. 4th Cir. 1967); see also *NLRB* v. *Heck's, Inc.*, 398 F. 2d 337, 338. The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8 (a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. See, *e. g.*, *United Steelworkers of America* v. *NLRB*, 126 U. S. App. D. C. 215, 376 F. 2d 770 (1967); *J. C. Penney Co., Inc.* v. *NLRB*, 384 F. 2d 479, 485–486 (C. A. 10th Cir. 1967).

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected

by a bargaining order, then such an order should issue (see n. 32, *supra*).

We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no *per se* rule that the commission of any unfair practice will automatically result in a § 8 (a)(5) violation and the issuance of an order to bargain. See *Aaron Brothers, supra.*

With these considerations in mind, we turn to an examination of the orders in these cases. In *Sinclair,* No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8 (a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats.[34] The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards. The employer argues, however, that its communications to its employees were protected by the First Amendment and § 8 (c) of the Act (29 U. S. C. § 158 (c)), whatever the effect of those communications on the union's majority or the Board's ability to ensure a fair election; it is to that contention that we shall direct our final attention in the next section.

In the three cases in Nos. 573 and 691 from the Fourth Circuit, on the other hand, the Board did not make a

[34] Under the doctrine of *Bernel Foam Products Co.,* 146 N. L. R. B. 1277 (1964), there is nothing inconsistent in the Union's filing an election petition and thereby agreeing that a question of representation exists, and then filing a refusal-to-bargain charge after the election is lost because of the employer's unfair labor practices.

similar finding that a bargaining order would have been necessary in the absence of an unlawful refusal to bargain. Nor did it make a finding that, even though traditional remedies might be able to ensure a fair election, there was insufficient indication that an election (or a rerun in *General Steel*) would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practices occurred. The employees argue that such findings would not be warranted, and the court below ruled in *General Steel* that available remedies short of a bargaining order could guarantee a fair election. 398 F. 2d 339, 340, n. 3. We think it possible that the requisite findings were implicit in the Board's decisions below to issue bargaining orders (and to set aside the election in *General Steel*); and we think it clearly inappropriate for the court below to make any contrary finding on its own (see n. 32, *supra*). Because the Board's current practice at the time required it to phrase its findings in terms of an employer's good or bad faith doubts (see Part II, *supra*), however, the precise analysis the Board now puts forth was not employed below, and we therefore remand these cases for proper findings.

IV.

We consider finally petitioner Sinclair's First Amendment challenge to the holding of the Board and the Court of Appeals for the First Circuit. At the outset we note that the question raised here most often arises in the context of a nascent union organizational drive, where employers must be careful in waging their anti-union campaign. As to conduct generally, the above-noted gradations of unfair labor practices, with their varying consequences, create certain hazards for employers when they seek to estimate or resist unionization efforts. But so long as the differences involve conduct easily avoided, such as discharge, surveillance, and coer-

cive interrogation, we do not think that employers can complain that the distinctions are unreasonably difficult to follow. Where an employer's antiunion efforts consist of speech alone, however, the difficulties raised are not so easily resolved. The Board has eliminated some of the problem areas by no longer requiring an employer to show affirmative reasons for insisting on an election and by permitting him to make reasonable inquiries. We do not decide, of course, whether these allowances are mandatory. But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8 (c) (29 U. S. C. § 158 (c)) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8 (a)(1). Section 8 (a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8 (a)(1) and the proviso to § 8 (c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the

election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk. Cf. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

Within this framework, we must reject the Company's challenge to the decision below and the findings of the Board on which it was based. The standards used below for evaluating the impact of an employer's statements are not seriously questioned by petitioner and we see no need to tamper with them here. Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality

of closing is capable of proof." 397 F. 2d 157, 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (C. A. 2d Cir. 1967).

Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of "demonstrable 'economic consequences,' " 397 F. 2d, at 160, but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question: "[W]hat did the speaker intend and the listener understand?" (A. Cox, Law and the National Labor Policy 44 (1960)), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors

of plant closings,[35] take such hints as coercive threats rather than honest forecasts.[36]

Petitioner argues that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, see *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479 (1941). But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "'brinkmanship'" when it becomes all too easy to "overstep and tumble [over] the brink," *Wausau Steel Corp.* v. *NLRB*, 377 F. 2d 369, 372 (C. A. 7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

For the foregoing reasons, we affirm the judgment of the Court of Appeals for the First Circuit in No. 585, and we reverse the judgments of the Court of Appeals for the Fourth Circuit in Nos. 573 and 691 insofar as they decline enforcement of the Board's orders to bargain and remand those cases to that court with directions to remand to the Board for further proceedings in conformity with this opinion.

It is so ordered.

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[35] See Bok, *supra*, n. 33, at 77; n. 31, *supra*.

[36] See, *e. g.*, *Kolmar Laboratories, Inc.*, 159 N. L. R. B. 805, 807–810, and cases (relied on by the trial examiner here) cited at 809, n. 3, enforced, 387 F. 2d 833 (C. A. 7th Cir. 1967); *Surprenant Mfg. Co.*, 144 N. L. R. B. 507, 510–511, enforced, 341 F. 2d 756, 761 (C. A. 6th Cir. 1965).

Syllabus.

KRAMER *v.* UNION FREE SCHOOL DISTRICT NO. 15 ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 258. Argued January 16, 1969.—
Decided June 16, 1969.

Section 2012 of the New York Education Law provides that in certain school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district elections only if they own or lease taxable realty in the district or are parents or custodians of children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, challenged the constitutionality of the section. A three-judge district court ruled § 2012 constitutional. *Held:* Section 2012 violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 625–633.

(a) Where a state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, it must be determined whether the exclusions are necessary to promote a compelling state interest. Pp. 625–630.

(b) Assuming, *arguendo*, that New York legitimately might limit the franchise in these school district elections to those "primarily interested in school affairs," the § 2012 classifications do not accomplish this purpose with sufficient precision to justify denying the franchise to appellant and members of his class, since the classifications include many persons at best only remotely interested in school affairs and exclude others directly interested. Pp. 630–633.

282 F. Supp. 70, reversed and remanded.

Osmond K. Fraenkel argued the cause for appellant. With him on the brief were *Melvin L. Wulf* and *Murray A. Miller.*

John P. Jehu argued the cause and filed briefs for appellees. *Louis J. Lefkowitz,* Attorney General, *pro se,*

Samuel A. Hirshowitz, First Assistant Attorney General, and *Daniel M. Cohen*, Assistant Attorney General, filed a brief for appellee the Attorney General of New York.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In this case we are called on to determine whether § 2012 of the New York Education Law is constitutional. The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, filed suit in federal court claiming that § 2012 denied him equal protection of the laws in violation of the Fourteenth Amendment. With one judge dissenting, a three-judge District Court dismissed appellant's complaint. Finding that § 2012 does violate the Equal Protection Clause of the Fourteenth Amendment, we reverse.

I.

New York law provides basically three methods of school board selection. In some large city districts, the school board is appointed by the mayor or city council. N. Y. Educ. Law § 2553, subds. 2, 4 (1953), as amended (Supp. 1968). On the other hand, in some cities, primarily those with less than 125,000 residents, the school board is elected at general or municipal elections in which all qualified city voters may participate. N. Y. Educ. Law §§ 2502, subd. 2, 2553, subd. 3 (1953). Cf. N. Y. Educ. Law § 2531 (1953). Finally, in other districts such as the one involved in this case, which are primarily rural

and suburban, the school board is elected at an annual meeting of qualified school district voters.[1]

The challenged statute is applicable only in the districts which hold annual meetings. To be eligible to vote at an annual district meeting, an otherwise qualified[2] district resident must either (1) be the owner or lessee of taxable real property located in the district, (2) be the spouse of one who owns or leases qualifying property, or (3) be the parent or guardian of a child enrolled for a specified time during the preceding year in a local district school.

Although the New York State Department of Education has substantial responsibility for education in the State, the local school districts maintain significant control over the administration of local school district affairs.[3] Generally, the board of education has the basic responsibility for local school operation, including prescribing the courses of study, determining the textbooks

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[1] In some districts the election takes place on the Wednesday following the district meeting. N. Y. Educ. Law § 2013 (Supp. 1968).

[2] The statute also requires that a voter be a citizen of the United States and at least 21 years of age. Appellant meets these requirements and does not challenge the citizenship, age, or residency requirements of § 2012. See *infra*, at 625. The statute is set out in the Appendix, *infra*.

[3] "But while the administration of schools and the formulation of general policies have been centralized in the State Education Department . . . the immediate control and operation of the schools in New York have to a large extent been vested in the localities. The thousands of districts . . . possess a high degree of authority in education. They decide matters of local taxation for school purposes, elect trustees and other school officials, purchase buildings and sites, employ teachers and . . . maintain discipline . . . ." Graves, Development of the Education Law in New York, 16 Consolidated Laws of New York (Education Law) xxiii (McKinney 1953). See R. Pyle, Some Aspects of Education in New York 9–13 (1967).

to be used, and even altering and equipping a former schoolhouse for use as a public library. N. Y. Educ. Law § 1709 (1953). Additionally, in districts selecting members of the board of education at annual meetings, the local voters also pass directly on other district matters. For example, they must approve the school budget submitted by the school board. N. Y. Educ. Law §§ 2021, 2022 (1953).[4] Moreover, once the budget is approved, the governing body of the villages within the school district must raise the money which has been declared "necessary for teachers' salaries and the ordinary contingent expenses [of the schools]." N. Y. Educ. Law § 1717 (1953).[5] The voters also may "authorize such acts and vote such taxes as they shall deem expedient . . . for . . . equipping for library use any former schoolhouse . . . [and] for the purchase of land and buildings for agricultural, athletic, playground or social center purposes . . . ." N. Y. Educ. Law § 416 (1953).

Appellant is a 31-year-old college-educated stockbroker who lives in his parents' home in the Union Free School District No. 15, a district to which § 2012 applies. He is a citizen of the United States and has voted in federal and state elections since 1959. However, since

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[4] In districts which do not have annual meetings, the budget is not submitted to district voters. Thus, in city districts where the board of education is elected by all the voters, the board has the power to set the budget and assess taxes to meet expenditures. In large city districts, where the board is appointed, the board must submit requests to the city government, much as would any other city department. R. Pyle, Some Aspects of Education in New York 11 (1967).

[5] The legislation provides that the money shall be raised through a "tax, to be levied upon all the real property in [the] village . . . ." And, the "corporate authorities shall have no power to withhold the sums so declared to be necessary . . . ." N. Y. Educ. Law § 1717 (1953).

he has no children and neither owns nor leases taxable real property, appellant's attempts to register for and vote in the local school district elections have been unsuccessful. After the school district rejected his 1965 application, appellant instituted the present class action challenging the constitutionality of the voter eligibility requirements.

The United States District Court for the Eastern District of New York denied appellant's request (made pursuant to 28 U. S. C. § 2281) that a three-judge district court be convened, and granted appellees' motion to dismiss appellant's complaint. *Kramer* v. *Union Free School District No. 15*, 259 F. Supp. 164 (D. C. E. D. N. Y. 1966). On appeal, the Court of Appeals for the Second Circuit reversed, ruling appellant's complaint warranted convening a three-judge court. *Kramer* v. *Union Free School District No. 15*, 379 F. 2d 491 (C. A. 2d Cir. 1967). On remand, the three-judge court ruled that § 2012 is constitutional and dismissed appellant's complaint. 282 F. Supp. 70. Pursuant to 28 U. S. C. § 1253, appellant filed a direct appeal with this Court; we noted probable jurisdiction. 393 U. S. 818 (1968).

II.

At the outset, it is important to note what is *not* at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington* v. *Rash*, 380 U. S. 89, 91 (1965); *Pope* v. *Williams*, 193 U. S. 621 (1904). The sole issue in this case is whether the *additional* requirements of § 2012—requirements which prohibit some district residents who are otherwise

qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws.

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968). And, in this case, we must give the statute a close and exacting examination. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964). See *Williams* v. *Rhodes*, *supra*, at 31; *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. *Reynolds* v. *Sims*, *supra*. See *Avery* v. *Midland County*, 390 U. S. 474 (1968). No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age.[6] Statutes granting the franchise to

[6] This case presents an issue different from the one we faced in *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U. S. 802 (1969). The present appeal involves an absolute denial of the franchise. In McDonald, on the other hand, we were reviewing a statute which made casting a ballot easier for some who were

residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.[7] Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash*, *supra*, at 96.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court

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unable to come to the polls. As we noted, there was no evidence that the statute absolutely prohibited anyone from exercising the franchise; at issue was not a claimed right to vote but a claimed right to an absentee ballot. *Id.*, at 807–808.

[7] Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Cf. N. Y. Educ. Law § 2553, subds. 2, 4 (1953), as amended (Supp. 1968). Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs. This is precisely the situation with regard to the size of the school budget in districts where § 2012 applies. See n. 4, *supra*.

can conceive of a "rational basis" for the distinctions made[8] are not applicable. See *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments[9] are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.[10]

The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject

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[8] See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 425–428 (1961); *Allied Stores* v. *Bowers*, 358 U. S. 522, 527 (1959); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947).

[9] Of course, we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation. See, *e. g.*, *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420 (1948); *Oyama* v. *California*, 332 U. S. 633, 640 (1948).

[10] Thus, statutes structuring local government units receive no less exacting an examination merely because the state legislature is fairly elected. See *Avery* v. *Midland County*, 390 U. S. 474, 481, n. 6 (1968).

to election might have been filled through appointment.[11] States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. In fact, we have held that where a county school board is an administrative, not legislative, body, its members need not be elected. *Sailors* v. *Kent Bd. of Education*, 387 U. S. 105, 108 (1967). However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia Bd. of Elections*, *supra*, at 665.[12]

Nor is the need for close judicial examination affected because the district meetings and the school board do not have "general" legislative powers. Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not. For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. Assuming the council were elected consistent with the commands of the Equal Protection Clause, the delegation of power to the mayor would not call for this Court's exacting review. On the other hand, if the city charter made the office of mayor subject to an

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[11] Similarly, no less a showing of a compelling justification for disenfranchising residents is required merely because the questions scheduled for the election need not have been submitted to the voters.

[12] In *Sailors* v. *Kent Bd. of Education*, 387 U. S. 105 (1967), each local school board sent one delegate to a biennial meeting at which the members of the county board of education were selected. We noted that "the choice of members of the county school board did not involve an election." *Id.*, at 111. However, we also pointed out that the members of the local school boards, who in effect made the county board appointments, were elected, but that "no constitutional complaint [was] raised respecting that election." *Ibid.*

election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.

III.

Besides appellant and others who similarly live in their parents' homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.

Appellant asserts that excluding him from participation in the district elections denies him equal protection of the laws. He contends that he and others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that "the decisions taken by local boards . . . may have grave consequences to the entire population." Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community.

We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First, appellees [13] argue that the State has a legitimate interest in limiting the franchise in school district elec-

[13] The Union Free School District No. 15 and each member of its board of education were named as defendants. The Attorney General of New York intervened as an appellee.

tions to "members of the community of interest"—those "primarily interested in such elections." Second, appellees urge that the State may reasonably and permissibly conclude that "property taxpayers" (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those "primarily interested" in school affairs.

We do not understand appellees to argue that the State is attempting to limit the franchise to those "subjectively concerned" about school matters. Rather, they appear to argue that the State's legitimate interest is in restricting a voice in school matters to those "directly affected" by such decisions. The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are "directly" affected by property tax changes should be allowed to vote. Similarly, parents of children in school are thought to have a "direct" stake in school affairs and are given a vote.

Appellees argue that it is necessary to limit the franchise to those "primarily interested" in school affairs because "the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system." Appellees say that many communications of school boards and school administrations are sent home to the parents through the district pupils and are "not broadcast to the general public"; thus, nonparents will be less informed than parents. Further, appellees argue, those who are assessed for local property taxes (either directly or indirectly through rent) will have enough of an interest "through the burden on their pocketbooks, to acquire such information as they may need."

We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those "primarily interested" or "primarily affected." Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited. For, assuming, *arguendo*, that New York legitimately might limit the franchise in these school district elections to those "primarily interested in school affairs," close scrutiny of the § 2012 classifications demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise.

Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal.[14] Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.[15]

[14] Of course, if the exclusions are necessary to promote the articulated state interest, we must then determine whether the interest promoted by limiting the franchise constitutes a compelling state interest. We do not reach that issue in this case.

[15] For example, appellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.

Nor do appellees offer any justification for the exclusion of seemingly interested and informed residents—other than to argue that the § 2012 classifications include those "whom the State could understandably deem to be the most intimately interested in actions taken by the school board," and urge that "the task of . . . balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the Legislature." [16] But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class.

The judgment of the United States District Court for the Eastern District of New York is therefore reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

Section 2012, New York Education Law:

"A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States.

"2. Twenty-one years of age.

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[16] We were informed at oral argument, however, that a very small proportion of the eligible voters attend the meetings.

"3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

"a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase or is the spouse of one who leases, hires or is in possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

"b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

"c. Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting.

"No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK and MR. JUSTICE HARLAN join, dissenting.

In *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, this Court upheld against constitutional attack a literacy requirement, applicable to voters in all state and federal elections, imposed by the State of North Carolina. Writing for a unanimous Court, MR. JUSTICE DOUGLAS said:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Wil-*

> *liams,* 193 U. S. 621, 633; *Mason* v. *Missouri,* 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns." 360 U. S., at 50–51.

Believing that the appellant in this case is not the victim of any "discrimination which the Constitution condemns," I would affirm the judgment of the District Court.

The issue before us may be briefly summarized. New York has provided that in certain areas of the State, local authority over public schools shall reside in "Union Free School Districts," such as the District involved here. In such areas, the qualified voters of the District annually elect members of a Board of Education and determine by vote the basic fiscal policy of the school system: they adopt a budget and in effect decide the amount of school taxes that shall be imposed upon the taxable real property of the District. State and federal grants provide some additional funds for the operation of the school system, but the only method by which the District itself may raise its own revenue is through such property taxes.[1]

Three classes of persons are qualified under New York law to vote in these school elections: (1) parents or guardians of children attending public schools within the District; (2) persons who own taxable real property within the District, and their spouses; and (3) persons who lease taxable real property within the District, and their spouses.[2] The appellant, a bachelor who lives with

[1] The District Court's statement to this effect has been explicitly reiterated and emphasized by the appellees, and the proposition is apparently conceded by the appellant. See N. Y. Educ. Law §§ 416, 1717, 2021; N. Y. Real Prop. Tax Law §§ 1302, 1306, 1308.

[2] New York's general age and residence requirements must also be met.

his parents and who neither owns nor leases any real property within the District, falls within none of those classes, and consequently is disqualified from voting despite the fact that he meets the general age and residence requirements imposed by state law. The question presented is whether, by virtue of that disqualification, the appellant is denied the equal protection of the laws.

Although at times variously phrased, the traditional test of a statute's validity under the Equal Protection Clause is a familiar one: a legislative classification is invalid only "if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives." *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556.[3] It was under just such a test that the literacy requirement involved in *Lassiter* was upheld. The premise of our decision in that case was that a State may constitutionally impose upon its citizens voting requirements reasonably "designed to promote intelligent use of the ballot." 360 U. S., at 51. A similar premise underlies the proposition, consistently endorsed by this Court,[4] that a State may exclude nonresidents from participation in its elections. Such residence requirements, designed to help ensure that voters have a substantial stake in the outcome of elections and an opportunity to become familiar with the candidates and issues voted upon, are entirely permis-

[3] See also *McGowan* v. *Maryland*, 366 U. S. 420, 425–426:

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

[4] *Pope* v. *Williams*, 193 U. S. 621; *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 51; *Carrington* v. *Rash*, 380 U. S. 89, 93–94, 96; see *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 666.

sible exercises of state authority. Indeed, the appellant explicitly concedes, as he must, the validity of voting requirements relating to residence, literacy, and age. Yet he argues—and the Court accepts the argument—that the voting qualifications involved here somehow have a different constitutional status. I am unable to see the distinction.

Clearly a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are nonresidents, will be more likely than nonresidents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn cannot infallibly perform their intended legislative function. Just as "[i]lliterate people may be intelligent voters,"[5] nonresidents or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore—as are residence, literacy, and age requirements imposed with respect to voting—there is no denial of equal protection.

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[5] *Lassiter* v. *Northampton Election Bd.*, 360 U. S., at 52.

Thus judged, the statutory classification involved here seems to me clearly to be valid. New York has made the judgment that local educational policy is best left to those persons who have certain direct and definable interests in that policy: those who are either immediately involved as parents of school children or who, as owners or lessees of taxable property, are burdened with the local cost of funding school district operations.[6] True, persons outside those classes may be genuinely interested in the conduct of a school district's business—just as commuters from New Jersey may be genuinely interested in the outcome of a New York City election. But unless this Court is to claim a monopoly of wisdom regarding the sound operation of school systems in the 50 States, I see no way to justify the conclusion that the legislative classification involved here is not rationally related to a legitimate legislative purpose. "There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them." *Doremus* v. *Board of Educ.*, 342 U. S. 429, 435 (DOUGLAS, J., dissenting).

With good reason, the Court does not really argue the contrary. Instead, it strikes down New York's statute by asserting that the traditional equal protection standard is inapt in this case, and that a considerably stricter standard—under which classifications relating to "the franchise" are to be subjected to "exacting judicial scrutiny"—should be applied. But the asserted justification for applying such a standard cannot withstand analysis.

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[6] Presumably the rationale for including lessees and their spouses in the electoral process is that the cost of property taxes is in many instances passed on from owner to lessee.

The Court is quite explicit in explaining why it believes this statute should be given "close scrutiny":

> "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." (Footnote omitted.)

I am at a loss to understand how such reasoning is at all relevant to the present case. The voting qualifications at issue have been promulgated, not by Union Free School District No. 15, but by the New York State Legislature, and the appellant is of course fully able to participate in the election of representatives in that body. There is simply no claim whatever here that the state government is not "structured so as to represent fairly all the people," including the appellant.

Nor is there any other justification for imposing the Court's "exacting" equal protection test. This case does not involve racial classifications, which in light of the genesis of the Fourteenth Amendment have traditionally been viewed as inherently "suspect." [7] And this statute is not one that impinges upon a constitutionally protected right, and that consequently can be justified only by a "compelling" state interest.[8] For "the Constitution of the United States does not confer the right of suffrage

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[7] *Korematsu* v. *United States*, 323 U. S. 214, 216; *McLaughlin* v. *Florida*, 379 U. S. 184, 192.

[8] *Shapiro* v. *Thompson*, 394 U. S. 618, 634; cf. *NAACP* v. *Alabama*, 357 U. S. 449, 463.

upon any one . . . ." *Minor* v. *Happersett*, 21 Wall. 162, 178.

In any event, it seems to me that under *any* equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. First of all, it must be emphasized—despite the Court's undifferentiated references to what it terms "the franchise"—that we are dealing here, not with a general election, but with a limited, special-purpose election.[9] The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and federal financial assistance to the District are determined. He clearly is not locked into any self-perpetuating status of exclusion from the electoral process.[10]

Secondly, the appellant is of course limited to asserting his own rights, not the purported rights of hypothetical childless clergymen or parents of preschool children, who neither own nor rent taxable property. The appellant's

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[9] Special-purpose governmental authorities such as water, lighting, and sewer districts exist in various sections of the country, and participation in such districts is undoubtedly limited in many instances to those who partake of the agency's services and are assessed for its expenses. The constitutional validity of such a policy is, it seems to me, unquestionable. And while it is true, as the appellant argues, that a school system has a more pervasive influence in the community than do most other such special-purpose authorities, I cannot agree that that difference in degree presents anything approaching a distinction of constitutional dimension.

[10] Compare *Lucas* v. *Forty-fourth General Assembly*, 377 U. S. 713, with *Reynolds* v. *Sims*, 377 U. S. 533. Since *Carrington* v. *Rash*, 380 U. S. 89, and *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, dealt with requirements for voting in general elections, those decisions do not control the result here.

status is merely that of a citizen who says he is interested in the affairs of his local public schools. If the Constitution requires that he must be given a decision-making role in the governance of those affairs, then it seems to me that any individual who seeks such a role must be given it. For as I have suggested, there is no persuasive reason for distinguishing constitutionally between the voter qualifications New York has required for its Union Free School District elections and qualifications based on factors such as age, residence, or literacy.[11]

Today's decision can only be viewed as irreconcilable with the established principle that "[t]he States have . . . broad powers to determine the conditions under which the right of suffrage may be exercised . . . ." Since I think that principle is entirely sound, I respectfully dissent from the Court's judgment and opinion.

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[11] A comparison of the classification made by New York with one based on literacy, for instance, presumably would attempt to weigh the interest of the person excluded from voting against the reasonableness of the legislative assumption regarding his competence as a voter or his connection with the subject matter of the election. In such a speculative analysis precision is not attainable; for that very reason, it seems to me, the standard of adjudication should be a reasonably tolerant one. But even assuming such an analysis were attempted, it could not in my view justify drawing a constitutional line between the classification involved here and a literacy requirement. True, the appellant and persons in his class might be thought to have generally more ability to vote intelligently than do illiterates. On the other hand, illiterate citizens clearly have considerably more of a stake in the outcome of general elections than do the members of the appellant's class in the result of school district elections.

PERKINS *v.* STANDARD OIL CO. OF CALIFORNIA.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 624. Argued April 22–23, 1969.—Decided June 16, 1969.

Petitioner, an independent wholesale and retail distributor of gasoline and oil, brought this treble-damage action against his supplier, Standard Oil Co., alleging injuries resulting from respondent's price discriminations in violation of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. The evidence showed that for over two years Standard's charges to petitioner were higher than those to (1) its Branded Dealers who competed with petitioner, and (2) Signal, a wholesaler, whose gas was sold to a subsidiary (Western Hyway), which in turn sold to Western's subsidiary (Regal), a major competitor of petitioner, the lower price being passed on at each stage, so that Regal was able to undersell petitioner. The jury returned a verdict for petitioner. The Court of Appeals, while finding Standard's liability clear for favoring the Branded Dealers, held the "fourth level" injuries petitioner sustained from the impaired competition with Regal too far removed from respondent to come within the Act. Since the jury's verdict did not disclose what amount of the damages awarded was attributable to Regal's conduct, the court ordered a new trial. That court for the trial judge's guidance on retrial also noted that any financial losses to petitioner from the inability of two of his corporations to pay him agreed brokerage fees for securing gasoline, for rental on leases of service stations, and for other indebtedness were too incidental to support recovery under the antitrust laws. *Held:*

1. Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, applies to respondent's price discriminations, which are not immunized from coverage under the statute simply because the product involved passed through additional formal exchanges before reaching petitioner's actual competitor. Cf. *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341. Pp. 646–648.

2. The evidence was sufficient to show a causal connection between Standard's price discrimination and the damage to petitioner's business. Pp. 648–649.

3. Since petitioner was the principal victim of Standard's price discrimination and not just an innocent bystander, he was entitled to present evidence of all his losses to the jury. Pp. 649–650.

396 F. 2d 809, reversed and case remanded to District Court for reinstatement of verdict and judgment.

Earl W. Kintner and *George R. Kucik* argued the cause for petitioner. With them on the briefs were *Thomas L. Siegel, Roger Tilbury, Ernest Bonyhadi,* and *Bruce M. Hall.*

Richard J. MacLaury argued the cause for respondent. With him on the brief were *Francis R. Kirkham* and *H. Helmut Loring.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1959 petitioner, Clyde A. Perkins, brought this civil antitrust action against the Standard Oil Company of California seeking treble damages under § 2 of the Clayton Act, as amended by the Robinson-Patman Act,[1] for injuries alleged to have resulted from Standard's price discriminations in the sale of gasoline and oil during a period of over two years from 1955 to 1957. In 1963, after

[1] Section 2 of the Clayton Act, 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13, provides in pertinent part as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

a lengthy and complicated trial, the jury returned a verdict for Perkins and assessed damages against Standard of $333,404.57, which, after trebling by the court and after the addition of attorney's fees, resulted in a total judgment against Standard of $1,298,213.71. On review, the Court of Appeals for the Ninth Circuit held that the assessment of damages included injuries to Perkins that were not recoverable under the Act and therefore ordered a new trial. *Standard Oil Co. of California* v. *Perkins*, 396 F. 2d 809. We granted certiorari to determine whether the Court of Appeals, in reversing the judgment, had correctly construed the Robinson-Patman Act.

Petitioner Perkins entered the oil and gasoline business in 1928 as the operator of a single service station in the State of Washington. By the mid-1950's he had become one of the largest independent distributors of gasoline and oil in both Washington and Oregon. He was both a wholesaler, operating storage plants and trucking equipment, and a retailer through his own Perkins stations. From 1945 until 1957, Perkins purchased substantially all of his gasoline requirements from Standard. From 1955 to 1957 Standard charged Perkins a higher price for its gasoline and oil than Standard charged to its own Branded Dealers,[2] who competed with Perkins, and to Signal Oil & Gas Co., a wholesaler whose gas eventually reached the pumps of a major competitor of Perkins. Perkins contends that Standard's price and price-related discriminations against him seriously harmed his competitive position and forced him, in 1957, to sacrifice by sale what remained of his once independent business to

[2] Branded Dealers were independent operators of Standard's Signal and Chevron stations who marketed gasoline and oil under Standard's brand names. During the claim period the Signal Branded Dealers had no connection with Signal Oil & Gas Co., which is involved in this litigation as a wholesaler.

one of the major companies in the gasoline business, Union Oil.

Many of the elements of liability on the part of Standard are not in dispute. Standard has admitted that it sold gasoline and oil to its Branded Dealers and to Signal Oil at discriminatorily lower prices than those at which it sold to Perkins. The Court of Appeals found that Standard's liability for the harm done Perkins by the favorable treatment of the Branded Dealers was beyond dispute. Of this aspect of the damages, the Court of Appeals said:

> "The Branded Dealers purchased gasoline and oil from Standard which they in turn sold at retail. With respect to them, Perkins' story is quickly told. Because of Standard's favoritism and discrimination they were able to and did offer lower prices and better services and facilities than Perkins in marketing at retail." 396 F. 2d, at 812.

With regard to Perkins' damage resulting from Standard's discrimination in favor of Signal Oil, however, the Court of Appeals took a different view because of the following circumstances under which the discriminatory sales were made. Standard admittedly sold gasoline to Signal at a lower price than it sold to Perkins. Signal sold this Standard gasoline to Western Hyway, which in turn sold the Standard gasoline to Regal Stations Co., Perkins' competitor. Perkins alleged that the lower price charged Signal by Standard was passed on to Signal's subsidiary Western Hyway, and then to Western's subsidiary, Regal. Regal's stations were thus able to undersell Perkins' stations and, according to Perkins, the resulting competitive harm, along with that he suffered at the hands of Standard's favored Branded Dealers, destroyed his ability to compete and eventually forced him to sell what was left of his business. The Court of

Appeals held, however, that any harm suffered by Perkins from impaired competition with Regal stations was beyond the scope of the Robinson-Patman Act because Regal was too far removed from Standard in the chain of distribution. A substantial part of the damages the jury assessed against Standard, as the Court of Appeals viewed it, might have been based upon a finding that Perkins suffered competitive harm from the price advantage held by Regal stations. That court, concluding that "the whole verdict is tainted, since the amount reflected in it by Regal's conduct cannot be ascertained, . . ." reversed the judgment and ordered a new trial. 396 F. 2d, at 813.

We disagree with the Court of Appeals' conclusion that § 2 of the Clayton Act, as amended by the Robinson-Patman Act, does not apply to the damages suffered by Perkins as a result of the price advantage granted by Standard to Signal, then by Signal to Western, then by Western to Regal. The Act, in pertinent part, provides:

> "(a) It shall be unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

The Court of Appeals read this language as limiting "the distributing levels on which a supplier's price discrimination will be recognized as potentially injurious to competition." 396 F. 2d, at 812. According to that court, the coverage of the Act is restricted to injuries caused by an impairment of competition with (1) the seller

("any person who . . . grants . . . such discrimination"), (2) the favored purchaser ("any person who . . . knowingly receives the benefit of such discrimination"), and (3) customers of the discriminating seller or favored purchaser ("customers of either of them"). Here, Perkins' injuries resulted in part from impaired competition with a customer (Regal) of a customer (Western Hyway) of the favored purchaser (Signal). The Court of Appeals termed these injuries "fourth level" and held that they were not protected by the Robinson-Patman Act. We conclude that this limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act.

In *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341 (1968), we held that a retailer who buys through a wholesaler could be considered a "customer" of the original supplier within the meaning of § 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act, a section dealing with discrimination in promotional allowances which is closely analogous to § 2 (a) involved in this case. In *Meyer*, the Court stated that to read "customer" narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act. Similarly, to read "customer" more narrowly in this section than we did in the section involved in *Meyer* would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain. Here, for example, Standard supplied gasoline and oil to Signal. Signal, allegedly because it furnished Standard with part of its vital supply of crude petroleum, was able to insist upon a discriminatorily lower price. Had Signal then sold its gas directly to the Regal stations, giving Regal stations a competitive advantage, there would be no question, even under the decision of the Court of Appeals in this case, that a clear violation of the Robinson-Patman Act had been committed. Instead of selling directly to the re-

tailer Regal, however, Signal transferred the gasoline first to its subsidiary, Western Hyway, which in turn supplied the Regal stations. Signal owned 60% of the stock of Western Hyway; Western in turn owned 55% of the stock of the Regal stations. We find no basis in the language or purpose of the Act for immunizing Standard's price discriminations simply because the product in question passed through an additional formal exchange before reaching the level of Perkins' actual competitor. From Perkins' point of view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer. Here Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.

Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered. This is true regardless of the "level" in the chain of distribution on which the injury occurs. The court below held that, as a matter of law, "Section 2 (a) of the Act does not recognize a causal connection, essential to liability, between a supplier's price discrimination and the trade practices of a customer as far removed on the distributive ladder as Regal was from Standard." 396 F. 2d, at 816. As we have noted above, we do not accept such an artificial limitation. If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury. *Continental Co.* v. *Union Carbide*, 370 U. S. 690, 700–701 (1962). Here the trial judge properly charged the jury that Perkins had the burden of showing that any damage to his business

was proximately caused by Standard's price discriminations and there was substantial evidence from which the jury could infer causation. There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act.

One other minor group of damages was found to be improper by the Court of Appeals and we conclude that this ruling was also erroneous. Perkins submitted some evidence tending to show that he as an individual had suffered financial losses because the two failing Perkins corporations (Perkins of Washington and Perkins of Oregon) were unable to pay him agreed brokerage fees for securing gasoline, rental on leases of service stations, and other indebtedness. The Court of Appeals, in order to give guidance to the trial judge at the proposed new trial, noted that, in its opinion, these damages were not proximately caused by Standard's violations and that Perkins should not recover for these damages in a second trial. For this proposition the Court of Appeals cited *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 363, which held that "the rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." It is clear in this case, however, that Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. Since he was directly injured

and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury. Moreover, it is obvious from the opinion of the Court of Appeals that this question was being decided, not because there was any reversible error at the first trial, but in order to give guidance for the conduct of any new trial. The record in this case does not show that the jury included an award for any of these minor items in its judgment. It is impossible to say that they were included because they were not covered in the trial judge's charge to the jury. While the trial judge treated many items of damage specifically, there was no charge—either specific or general—upon which the jury could have felt free to include such items in its award. For this reason, the Court of Appeals could not have reversed the jury's verdict in this case on this ground.

Respondent has argued in its brief several minor trial rulings which it contends were in error. Most of these additional arguments were rejected by the Court of Appeals. We have examined the others and find them without merit. We therefore see no need to prolong this litigation which began nearly 10 years ago. The jury's verdict and judgment should be reinstated.

It is so ordered.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with the Court that the judgment of the Court of Appeals cannot be affirmed. But I cannot agree either with the broad, and somewhat vague, ground of decision chosen by the Court or with the conclusion that the jury verdict in this case must be reinstated.

As I view it, this case poses only a very narrow question. Respondent discriminated in price in favor of

Signal Oil & Gas Co. Through a chain of majority-owned subsidiaries, Signal marketed this gasoline at stations which competed with petitioner's outlets. Since we are dealing with a chain of majority-owned subsidiaries, it seems quite likely that the discriminatory price given Signal would have a vital effect on the pricing decisions of the stations which eventually marketed Signal's gasoline. Even if the lower price were not passed on to the company marketing the gasoline, that company would be more willing to accept losses in a protracted price war if it knew that its "grandfather" corporation were making some extra, and partially offsetting, profits. For this reason, and since in interpreting the antitrust laws "[w]e must look at the economic reality of the relevant transactions," *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 208 (1968), I would treat Signal, the beneficiary of the discriminatory price, as if it were directly competing with petitioner's stations. Respondent's price discrimination, on this view, in effect injured competition with a company which "knowingly receive[d] the benefit of such discrimination," Clayton Act § 2 (a), 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), and the case could properly go to the jury for determination of "causation" and damages. Accordingly, I see no reason to intimate, even by indirection, what the result would be if wholly independent firms had intervened in the distribution chain. I would therefore explicitly limit the holding to the facts of the case before us.

Moreover, I see no reason for the Court to undertake the difficult task of sorting out all the other issues in this case. The Court of Appeals based its reversal solely on its view of the "fourth line injury" problem. Other issues were treated on the assumption that the case would have to go back for trial. The record in this case is long and complicated and we have no idea what

view the Court of Appeals would have taken about respondent's other allegations of error had the major prop for its decision been removed. The law under the Robinson-Patman Act is convoluted enough without the addition of numerous explicit and implicit holdings which may come back to bedevil us in future years. I would leave these other problems unresolved so that the Court of Appeals can look at them anew in the context of this Court's holding on the major issue of general importance presented by the petition for certiorari.

LEAR, INC. *v.* ADKINS.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 56. Argued November 20–21, 1968.—Decided June 16, 1969.

Respondent, an engineer and inventor, was hired in 1952 by petitioner (Lear) to help solve gyroscope development problems. They had agreed that "new ideas, discoveries, inventions etc. related to . . . vertical gyros become the property of" respondent, and that the inventor would grant Lear a license as to all ideas he might develop "on a mutually satisfactory royalty basis." Shortly thereafter respondent developed a method for improving gyros which Lear incorporated into its production process. In 1954 respondent filed a patent application covering these improvements and entered into licensing negotiations with Lear to establish a royalty rate. An agreement, concluded in 1955, provided that if the "Patent Office refuses to issue a patent . . . or if such a patent so issued is subsequently held invalid . . . Lear at its option shall have the right forthwith to terminate the specific license so affected or to terminate this entire Agreement . . . ." A patent was issued to respondent in 1960, after several rejections of the application. In 1957 Lear stated that a Patent Office search disclosed a patent which fully anticipated respondent's discovery and that it would no longer pay royalties on the gyros it produced in its Michigan plant, although it continued to pay royalties on gyros produced in its California plant until 1959. Upon receipt of his patent respondent brought suit in the California courts claiming that both the Michigan and California gyros used his patent and that Lear's failure to pay royalties breached the 1955 contract and Lear's quasi-contractual obligations. Although Lear tried to raise patent invalidity as a defense, the trial judge directed a verdict for respondent on the California gyros, holding that Lear was estopped by its licensing agreement from questioning the licensor's patent. Since Lear claimed that it developed its Michigan gyro designs independently of respondent's ideas, the judge instructed the jury to award recovery to the inventor only if it was satisfied that the invention was novel. When the jury returned a substantial verdict for respondent on the Michigan gyros the judge granted Lear's motion for judgment notwithstanding the verdict, finding that the invention had been

completely anticipated by the prior art. The California Supreme Court held that the 1955 agreement was still in effect, that Lear did not have the right thereunder to terminate its royalty obligations in 1959, and that the doctrine of estoppel barred Lear from questioning the patent. Noting Lear's claim that it had developed the Michigan gyros independently, the court considered "whether what is being built by Lear [in Michigan] springs *entirely* from the prior art," found that Lear had in fact utilized the patent throughout the period in question, and reinstated the jury's verdict. *Held:*

1. Since the California Supreme Court's construction of the 1955 licensing agreement is solely a matter of state law, the only issue open here is raised by the court's reliance on the doctrine of estoppel to bar Lear from contesting the validity of the patent. Pp. 661–662.

2. In the accommodation of (1) the common law of contracts, and (2) the federal law of patents requiring that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent, the technical requirements of contract doctrine must yield to the demands of the public interest in the typical situation involving the negotiation of a license after a patent has issued. The holding of *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 836, that licensee estoppel was "the general rule," is overruled. Pp. 668–671.

3. Overriding federal policies would be significantly frustrated if licensees could be required to continue to pay royalties while challenging patent validity in the courts, and in this case Lear must be permitted to avoid payment of all royalties accruing after the issuance of the patent if Lear can prove that the patent is invalid. Pp. 671–674.

4. Respondent's claim to contractual royalties accruing before the issuance of the patent, which raises the question of whether, and to what extent, the States may protect the owners of *unpatented* inventions who are willing to disclose their ideas only upon the payment of royalties is remanded for specific consideration by the California courts. Pp. 674–675.

5. It is inappropriate at this time to pass upon Lear's contention that the patent is invalid, as Lear must address its arguments attacking the validity of the underlying patent to the California courts in the first instance. Pp. 675–676.

67 Cal. 2d 882, 435 P. 2d 321, vacated and remanded.

C. Russell Hale argued the cause for petitioner. With him on the briefs were *Edwin L. Hartz, Thomas G. Corcoran,* and *Allen E. Throop.*

Peter R. Cohen argued the cause for respondent. With him on the brief was *Allen E. Susman.*

Lawrence G. Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Zimmerman,* and *Howard E. Shapiro.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

In January of 1952, John Adkins, an inventor and mechanical engineer, was hired by Lear, Incorporated, for the purpose of solving a vexing problem the company had encountered in its efforts to develop a gyroscope which would meet the increasingly demanding requirements of the aviation industry. The gyroscope is an essential component of the navigational system in all aircraft, enabling the pilot to learn the direction and attitude of his airplane. With the development of the faster airplanes of the 1950's, more accurate gyroscopes were needed, and the gyro industry consequently was casting about for new techniques which would satisfy this need in an economical fashion. Shortly after Adkins was hired, he developed a method of construction at the company's California facilities which improved gyroscope accuracy at a low cost. Lear almost immediately incorporated Adkins' improvements into its production process to its substantial advantage.

The question that remains unsettled in this case, after eight years of litigation in the California courts, is whether Adkins will receive compensation for Lear's use of those improvements which the inventor has subsequently patented. At every stage of this lawsuit, Lear has sought to prove that, despite the grant of a patent

by the Patent Office, none of Adkins' improvements were sufficiently novel to warrant the award of a monopoly under the standards delineated in the governing federal statutes. Moreover, the company has sought to prove that Adkins obtained his patent by means of a fraud on the Patent Office. In response, the inventor has argued that since Lear had entered into a licensing agreement with Adkins, it was obliged to pay the agreed royalties regardless of the validity of the underlying patent.

The Supreme Court of California unanimously vindicated the inventor's position. While the court recognized that generally a manufacturer is free to challenge the validity of an inventor's patent, it held that "one of the oldest doctrines in the field of patent law establishes that so long as a licensee is operating under a license agreement he is estopped to deny the validity of his licensor's patent in a suit for royalties under the agreement. The theory underlying this doctrine is that a licensee should not be permitted to enjoy the benefit afforded by the agreement while simultaneously urging that the patent which forms the basis of the agreement is void." 67 Cal. 2d 882, 891, 435 P. 2d 321, 325–326 (1967).

Almost 20 years ago, in its last consideration of the doctrine, this Court also invoked an estoppel to deny a licensee the right to prove that his licensor was demanding royalties for the use of an idea which was in reality a part of the public domain. *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 836 (1950). We granted certiorari in the present case, 391 U. S. 912, to reconsider the validity of the *Hazeltine* rule in the light of our recent decisions emphasizing the strong federal policy favoring free competition in ideas which do not merit patent protection. *Sears, Roebuck* v. *Stiffel Co.*, 376 U. S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964).

I.

At the very beginning of the parties' relationship, Lear and Adkins entered into a rudimentary one-page agreement which provided that although "[a]ll new ideas, discoveries, inventions, etc., related to . . . vertical gyros become the property of Mr. John S. Adkins," the inventor promised to grant Lear a license as to all ideas he might develop "on a mutually satisfactory royalty basis."[1] As soon as Adkins' labors yielded tangible results, it quickly became apparent to the inventor that further steps should be taken to place his rights to his ideas on a firmer basis. On February 4, 1954, Adkins filed an application with the Patent Office in an effort to gain federal protection for his improvements. At about the same time, he entered into a lengthy period of negotiations with Lear in an effort to conclude a licensing agreement which would clearly establish the amount of royalties that would be paid.

These negotiations finally bore fruit on September 15, 1955, when the parties approved a complex 17-page contract which carefully delineated the conditions upon which Lear promised to pay royalties for Adkins' improvements. The parties agreed that if "the U. S. Patent Office refuses to issue a patent on the substantial claims [contained in Adkins' original patent application] or if such a patent so issued is subsequently held invalid, then in any of such events Lear at its option shall have the right forthwith to terminate the specific license so affected or to terminate this entire Agreement . . . ." § 6. (2 App. 138.)

[1] Lear argues that this original agreement was not submitted in evidence at trial and so should not be considered a part of the record on appeal. The California Supreme Court, however, treated the agreement as an important part of the record before it, 67 Cal. 2d, at 906, 435 P. 2d, at 335; and so we are free to refer to it.

As the contractual language indicates, Adkins had not obtained a final Patent Office decision as to the patentability of his invention at the time the licensing agreement was concluded. Indeed, he was not to receive a patent until January 5, 1960. This long delay has its source in the special character of Patent Office procedures. The regulations do not require the Office to make a final judgment on an invention's patentability on the basis of the inventor's original application.[2] While it sometimes happens that a patent is granted at this early stage, it is far more common for the Office to find that although certain of the applicant's claims may be patentable, certain others have been fully anticipated by the earlier developments in the art. In such a situation, the Patent Office does not attempt to separate the wheat from the chaff on its own initiative. Instead, it rejects the application, giving the inventor the right to make an amendment which narrows his claim to cover only those aspects of the invention which are truly novel.[3] It often happens, however, that even after an application is amended, the Patent Office finds that some of the remaining claims are unpatentable. When this occurs, the agency again issues a rejection which is subject to further amendment.[4] And so the process of rejection and amendment continues until the Patent Office Examiner either grants a patent or concludes that none of the inventor's claims could possibly be patentable, at which time a final rejection is entered on the Office's records.[5] Thus, when Adkins made his original application in 1954, it took the average inventor more than three years before he obtained a final administrative decision on the patentability of his ideas, with the Patent

[2] 37 CFR § 1.111 (1967).
[3] 37 CFR § 1.106 (1967).
[4] 37 CFR § 1.112 (1967).
[5] 37 CFR § 1.113 (1967).

Office acting on the average application from two to four times.[6]

The progress of Adkins' effort to obtain a patent followed the typical pattern. In his initial application, the inventor made the ambitious claim that his entire method of constructing gyroscopes was sufficiently novel to merit protection. The Patent Office, however, rejected this initial claim, as well as two subsequent amendments, which progressively narrowed the scope of the invention sought to be protected. Finally, Adkins narrowed his claim drastically to assert only that the design of the apparatus used to achieve gyroscope accuracy was novel.[7] In response, the Office issued its 1960 patent, granting a 17-year monopoly on this more modest claim.

During the long period in which Adkins was attempting to convince the Patent Office of the novelty of his ideas, however, Lear had become convinced that Adkins would never receive a patent on his invention and that it should not continue to pay substantial royalties on ideas which had not contributed substantially to the development of the art of gyroscopy. In 1957, after Adkins' patent application had been rejected twice, Lear announced that it had searched the Patent Office's files and had found a patent which it believed had fully anticipated Adkins' discovery. As a result, the company stated that it would no longer pay royalties on the large number of gyroscopes it was producing at its plant in Grand Rapids, Michigan (the Michigan gyros). Payments were continued on the smaller number of gyros produced at the company's

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[6] A. Seidel, What the General Practitioner Should Know About Patent Law and Practice 61 (A. L. I. 1956).

[7] Adkins actually amended his application a third time before he made the amendment which gained the approval of the Patent Office. This third amendment was superseded by the successful amendment, however, before the Patent Office considered it.

California plant (the California gyros) for two more years until they too were terminated on April 8, 1959.

As soon as Adkins obtained his patent in 1960, he brought this lawsuit in the California Superior Court. He argued to a jury that both the Michigan and the California gyros incorporated his patented apparatus and that Lear's failure to pay royalties on these gyros was a breach both of the 1955 contract and of Lear's quasi-contractual obligations. Although Lear sought to raise patent invalidity as a defense, the trial judge directed a verdict of $16,351.93 for Adkins on the California gyros, holding that Lear was estopped by its licensing agreement from questioning the inventor's patent. The trial judge took a different approach when it came to considering the Michigan gyros. Noting that the company claimed that it had developed its Michigan designs independently of Adkins' ideas, the court instructed the jury to award the inventor recovery only if it was satisfied that Adkins' invention was novel, within the meaning of the federal patent laws. When the jury returned a verdict for Adkins of $888,122.56 on the Michigan gyros,[8] the trial judge granted Lear's motion for judgment notwithstanding the verdict, finding that Adkins' invention had been completely anticipated by the prior art.[9]

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[8] For purposes of the present lawsuit, the parties stipulated that the jury would award only those damages accruing before May 31, 1963.

[9] Adkins also filed a second cause of action which contended that Lear had wrongfully appropriated a valuable trade secret and so was liable regardless of the validity of the inventor's contractual and quasi-contractual theories. The trial court, however, required Adkins to choose between his contract and tort claims. Since the California Supreme Court completely vindicated the inventor's right to contractual royalties, it was not obliged to consider the propriety of this aspect of the trial judge's decision. Consequently, the tort claim is not before us at this time.

Neither side was satisfied with this split decision, and both appealed to the California District Court of Appeal, which adopted a quite different approach. The court held that Lear was within its contractual rights in terminating its royalty obligations entirely in 1959, and that if Adkins desired to recover damages after that date he was "relegated to an action for infringement" in the federal courts. 52 Cal. Rptr. 795, 806. So far as pre-1959 royalties were concerned, the court held that the contract required the company to pay royalties on both the California and Michigan gyros regardless of the validity of the inventor's patent. 52 Cal. Rptr., at 809.

Once again both sides appealed, this time to the California Supreme Court, which took yet another approach to the problem presented. The court rejected the District Court of Appeal's conclusion that the 1955 license gave Lear the right to terminate its royalty obligations in 1959. Since the 1955 agreement was still in effect, the court concluded, relying on the language we have already quoted, that the doctrine of estoppel barred Lear from questioning the propriety of the Patent Office's grant. 67 Cal. 2d, at 907, 435 P. 2d, at 336. The court's adherence to estoppel, however, was not without qualification. After noting Lear's claim that it had developed its Michigan gyros independently, the court tested this contention by considering "whether what is being built by Lear [in Michigan] springs *entirely*" (emphasis supplied) from the prior art. 67 Cal. 2d, at 913, 435 P. 2d, at 340. Applying this test, it found that Lear had in fact "utilized the apparatus patented by Adkins throughout the period in question," 67 Cal. 2d, at 915, 435 P. 2d, at 341, and reinstated the jury's $888,000 verdict on this branch of the case.

II.

Since the California Supreme Court's construction of the 1955 licensing agreement is solely a matter of state

law, the only issue open to us is raised by the court's reliance upon the doctrine of estoppel to bar Lear from proving that Adkins' ideas were dedicated to the common welfare by federal law.[10] In considering the propriety of the State Court's decision, we are well aware that we are not writing upon a clean slate. The doctrine of estoppel has been considered by this Court in a line of cases reaching back into the middle of the 19th century. Before deciding what the role of estoppel

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[10] Adkins claims that we have no jurisdiction to decide the federal question presented because the company did not adequately preserve it in its argument before the State Supreme Court. We do not agree. While it is true that Lear did not ask the Supreme Court to repudiate estoppel entirely, it did seek to persuade the court to carve out an exception to the estoppel principle which was so sweeping as to undermine the doctrine's vitality completely. The company argued, on the basis of federal as well as state cases, that a licensee may escape the impact of estoppel simply by announcing that it has repudiated the licensing agreement, regardless of the contract's terms. See, *e. g.*, Respondent's and Cross-Appellant's Opening Brief in Cases Nos. 28624 and 30089, at 110–111.

The California Supreme Court rejected this argument on its merits:

"Lear relies on authorities holding that a licensee may terminate a license agreement upon notice to his licensor even though, prior to termination, there has been no adjudication of invalidity of the patent which is the subject of the agreement and that thereafter the licensee may challenge the validity of the patent. (See, e. g., *Armstrong Co.* v. *Shell Co. of Cal.* (1929) 98 Cal. App. 769, 778–779). This rule has no application if the agreement sets forth the particular circumstances under which termination must occur. As stated above, such provisions must be complied with in order to effect a valid cancellation." 67 Cal. 2d, at 899–900 n. 15, 435 P. 2d, at 331, n. 15.

We clearly have jurisdiction to consider whether this decision is wrong. In doing so, we have the duty to consider the broader implications of Lear's contention, and vindicate, if appropriate, its claim to relief on somewhat different grounds than it chose to advance below, especially when the California court recognized, in language we have already quoted, *supra*, at 656, that matters of basic principle are at stake.

should be in the present case and in the future, it is, then, desirable to consider the role it has played in the past.

A.

While the roots of the doctrine have often been celebrated in tradition, we have found only one 19th century case in this Court that invoked estoppel in a considered manner. And that case was decided before the Sherman Act made it clear that the grant of monopoly power to a patent owner constituted a limited exception to the general federal policy favoring free competition. *Kinsman* v. *Parkhurst*, 18 How. 289 (1856).[11] Curiously, a second decision often cited as supporting the estoppel doctrine points clearly in the opposite direction. *St. Paul Plow Works* v. *Starling*, 140 U. S. 184 (1891), did not even question the right of the lower courts to admit the licensee's evidence showing that the patented device was not novel. A unanimous Court merely held that, where there was conflicting evidence as to an invention's novelty, it would not reverse the decision of the lower court upholding the patent's validity.

In the very next year, this Court found the doctrine of patent estoppel so inequitable that it refused to grant an injunction to enforce a licensee's promise never to contest the validity of the underlying patent. "It is as

[11] There are two other early cases which enforced patent licenses without a thorough consideration of the estoppel issues that were presented. In *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488 (1871), the Court held that a licensee was obliged to overcome a "very strong presumption" of patent validity in order to avoid his royalty obligations, without indicating how much more compelling a showing was required than was considered necessary in an ordinary infringement action. In *Dale Tile Manufacturing Co.* v. *Hyatt*, 125 U. S. 46 (1888), this Court affirmed the decision of the New York state courts invoking the doctrine of licensee estoppel, on the ground that the estoppel question presented was one which involved only state law.

important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly . . . ." *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224, 234 (1892).

Although this Court invoked an estoppel in 1905 without citing or considering *Pope*'s powerful argument, *United States* v. *Harvey Steel Co.*, 196 U. S. 310, the doctrine was not to be applied again in this Court until it was revived in *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc., supra*, which declared, without prolonged analysis, that licensee estoppel was "the general rule." 339 U. S., at 836. In so holding, the majority ignored the teachings of a series of decisions this Court had rendered during the 45 years since *Harvey* had been decided. During this period, each time a patentee sought to rely upon his estoppel privilege before this Court, the majority created a new exception to permit judicial scrutiny into the validity of the Patent Office's grant. Long before *Hazeltine* was decided, the estoppel doctrine had been so eroded that it could no longer be considered the "general rule," but was only to be invoked in an ever-narrowing set of circumstances.

B.

The estoppel rule was first stringently limited in a situation in which the patentee's equities were far more compelling than those presented in the typical licensing arrangement. *Westinghouse Electric & Manufacturing Co.* v. *Formica Insulation Co.*, 266 U. S. 342 (1924), framed a rule to govern the recurring problem which arises when the original patent owner, after assigning his patent to another for a substantial sum, claims that the patent is worthless because it contains no new ideas. The courts of appeals had traditionally refused to permit such a defense to an infringement action on the ground

that it was improper both to "sell and keep the same thing," *Faulks* v. *Kamp*, 3 F. 898, 902 (1880). Nevertheless, *Formica* imposed a limitation upon estoppel which was radically inconsistent with the premises upon which the "general rule" is based. The Court held that while an assignor may not directly attack the validity of a patent by reference to the prior state of the art, he could introduce such evidence to *narrow* the claims made in the patent. "The distinction may be a nice one but seems to be workable." 266 U. S., at 351. Workable or not, the result proved to be an anomaly: if a patent had *some* novelty *Formica* permitted the old owner to defend an infringement action by showing that the invention's novel aspects did not extend to the inclusion of the old owner's products; on the other hand, if a patent had *no* novelty at all, the old owner could not defend successfully since he would be obliged to launch the direct attack on the patent that *Formica* seemed to forbid. The incongruity of this position compelled at least one court of appeals to carry the reasoning of the *Formica* exception to its logical conclusion. In 1940 the Seventh Circuit held that a licensee could introduce evidence of the prior art to show that the licensor's claims were not novel at all and thus successfully defend an action for royalties. *Casco Products Corp.* v. *Sinko Tool & Manufacturing Co.*, 116 F. 2d 119.

In *Scott Paper Co.* v. *Marcalus Manufacturing Co.*, 326 U. S. 249 (1945), this Court adopted a position similar to the Seventh Circuit's, undermining the basis of patent estoppel even more than *Formica* had done. In *Scott*, the original patent owner had attempted to defend an infringement suit brought by his assignee by proving that his product was a copy of an expired patent. The Court refused to permit the assignee to invoke an estoppel, finding that the policy of the patent laws would be frustrated if a manufacturer was required to pay for the use of information which, under the patent statutes, was

the property of all. Chief Justice Stone, for the Court, did not go beyond the precise question presented by a manufacturer who asserted that he was simply copying an expired patent. Nevertheless it was impossible to limit the *Scott* doctrine to such a narrow compass. If patent policy forbids estoppel when the old owner attempts to show that he did no more than copy an expired patent, why should not the old owner also be permitted to show that the invention lacked novelty because it could be found in a technical journal or because it was obvious to one knowledgeable in the art? As Justice Frankfurter's dissent indicated, *id.*, at 258–264, there were no satisfactory answers to these questions. The *Scott* exception had undermined the very basis of the "general rule."

C.

At about the time *Scott* was decided, this Court developed yet another doctrine which was profoundly antithetic to the principles underlying estoppel. In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942), the majority refused to permit a licensor to enforce the license's price-fixing provisions without permitting the licensee to contest the validity of the underlying patent. Since the price-fixing clause was *per se* illegal but for the existence of a valid patent, this narrow exception could be countenanced without compromising the general estoppel principle. But the *Sola* Court went further: it held that since the patentee had sought to enforce the price-fixing clause, the licensee could *also* avoid paying royalties if he could show that the patent was invalid. Five years later, the "anti-trust exception" was given an even more extensive scope in the *Katzinger* and *MacGregor* cases.[12] Here, licensors

[12] *Edward Katzinger Co.* v. *Chicago Metallic Manufacturing Co.*, 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Electric & Manufacturing Co.*, 329 U. S. 402 (1947).

were not permitted to invoke an estoppel despite the fact that they sought only to collect their royalties. The mere existence of a price-fixing clause in the license was held to be enough to bring the validity of the patent into question. Thus in the large number of cases in which licensing agreements contained restrictions that were arguably illegal under the antitrust laws, the doctrine of estoppel was a dead letter. Justice Frankfurter, in dissent, went even further, concluding that *Katzinger* and *MacGregor* had done all but repudiate the estoppel rule: "If a doctrine that was vital law for more than ninety years will be found to have now been deprived of life, we ought at least to give it decent public burial." 329 U. S., at 416.

D.

The lower courts, both state and federal, have also hedged the impact of estoppel by creating exceptions which have indicated a recognition of the broader policies pointing to a contrary approach. It is generally the rule that licensees may avoid further royalty payments, regardless of the provisions of their contract, once a third party proves that the patent is invalid. See, *e. g.*, *Drackett Chemical Co.* v. *Chamberlain Co.*, 63 F. 2d 853 (1933). Some courts have gone further to hold that a licensee may notify the patent owner that he is repudiating his agreement, regardless of its terms, and may subsequently defend any action for royalties by proving patent invalidity. Note, The Doctrine of Licensee Repudiation in Patent Law, 63 Yale L. J. 125 (1953); R. Ellis, Patent Licenses § 328 (3d ed., A. Deller 1958). And even in the 19th century, state courts had held that if the licensee had not actually sold products incorporating the patent's ideas, he could challenge the validity of the patent. See Forkosch, Licensee

Estoppel in Patent Law, 20 Temp. L. Q. 515, 529, n. 45 (1947).[13]

III.

The uncertain status of licensee estoppel in the case law is a product of judicial efforts to accommodate the competing demands of the common law of contracts and the federal law of patents. On the one hand, the law of contracts forbids a purchaser to repudiate his promises simply because he later becomes dissatisfied with the bargain he has made.[14] On the other hand, federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent. *Sears, Roebuck* v. *Stiffel Co., supra; Compco Corp.* v. *Day-Brite Lighting, Inc., supra.* When faced with this basic conflict in policy, both this Court and courts throughout the land have naturally sought to develop an intermediate position which somehow would remain responsive to the radically different concerns of the two different worlds of contract and patent. The result has been a failure. Rather than creative compromise, there has been a chaos of conflicting case law, proceeding on inconsistent premises. Before renewing the search for an acceptable middle ground, we must reconsider on their own merits the arguments which may properly be advanced on both sides of the estoppel question.

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[13] In addition to the works cited in the text, a detailed explication of the development of estoppel doctrine may be found in Cooper, Estoppel to Challenge Patent Validity: The Case of Private Good Faith vs. Public Policy, 18 W. Res. L. Rev. 1122 (1967), and in Kramer, Estoppel To Deny Validity—A Slender Reed, 23 N. Y. U. Intra. L. Rev. 237 (1968).

[14] See 1 A. Corbin, Contracts § 127 (1963); Treece, Licensee Estoppel in Patent and Trademark Cases, 53 Iowa L. Rev. 525, 528–530 (1967).

A.

It will simplify matters greatly if we first consider the most typical situation in which patent licenses are negotiated. In contrast to the present case, most manufacturers obtain a license after a patent has issued. Since the Patent Office makes an inventor's ideas public when it issues its grant of a limited monopoly,[15] a potential licensee has access to the inventor's ideas even if he does not enter into an agreement with the patent owner. Consequently, a manufacturer gains only two benefits if he chooses to enter a licensing agreement after the patent has issued. First, by accepting a license and paying royalties for a time, the licensee may have avoided the necessity of defending an expensive infringement action during the period when he may be least able to afford one. Second, the existence of an unchallenged patent may deter others from attempting to compete with the licensee.[16]

Under ordinary contract principles the mere fact that some benefit is received is enough to require the enforcement of the contract, regardless of the validity of the underlying patent. Nevertheless, if one tests this result by the standard of good-faith commercial dealing, it seems far from satisfactory. For the simple contract approach entirely ignores the position of the licensor who is seeking to invoke the court's assistance on his behalf. Consider, for example, the equities of the licensor who has obtained his patent through a fraud on the Patent Office. It is difficult to perceive why good

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[15] 37 CFR §§ 1.11, 1.13 (1967).

[16] Of course, the value of this second benefit may depend upon whether the licensee has obtained exclusive or nonexclusive rights to the use of the patent. Even in the case of nonexclusive licenses, however, competition is limited to the extent that the royalty charged by the patentee serves as a barrier to entry.

faith requires that courts should permit him to recover royalties despite his licensee's attempts to show that the patent is invalid. Compare *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965).

Even in the more typical cases, not involving conscious wrongdoing, the licensor's equities are far from compelling. A patent, in the last analysis, simply represents a legal conclusion reached by the Patent Office. Moreover, the legal conclusion is predicated on factors as to which reasonable men can differ widely. Yet the Patent Office is often obliged to reach its decision in an *ex parte* proceeding, without the aid of the arguments which could be advanced by parties interested in proving patent invalidity. Consequently, it does not seem to us to be unfair to require a patentee to defend the Patent Office's judgment when his licensee places the question in issue, especially since the licensor's case is buttressed by the presumption of validity which attaches to his patent. Thus, although licensee estoppel may be consistent with the letter of contractual doctrine, we cannot say that it is compelled by the spirit of contract law, which seeks to balance the claims of promisor and promisee in accord with the requirements of good faith.

Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain. Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification. We think it plain that the technical requirements of contract doctrine must give way before the demands of the public interest in the typical situation

involving the negotiation of a license after a patent has issued.

We are satisfied that *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc., supra,* itself the product of a clouded history, should no longer be regarded as sound law with respect to its "estoppel" holding, and that holding is now overruled.

B.

The case before us, however, presents a far more complicated estoppel problem than the one which arises in the most common licensing context. The problem arises out of the fact that Lear obtained its license in 1955, more than four years before Adkins received his 1960 patent. Indeed, from the very outset of the relationship, Lear obtained special access to Adkins' ideas in return for its promise to pay satisfactory compensation.

Thus, during the lengthy period in which Adkins was attempting to obtain a patent, Lear gained an important benefit not generally obtained by the typical licensee. For until a patent issues, a potential licensee may not learn his licensor's ideas simply by requesting the information from the Patent Office. During the time the inventor is seeking patent protection, the governing federal statute requires the Patent Office to hold an inventor's patent application in confidence.[17] If a poten-

[17] 35 U. S. C. § 122 provides:

"Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."

The present regulations issued by the Patent Office unequivocally guarantee that: "Pending patent applications are preserved in secrecy . . . unless it shall be necessary to the proper conduct of business before the Office" to divulge their contents. 37 CFR

tial licensee hopes to use the ideas contained in a secret patent application, he must deal with the inventor himself, unless the inventor chooses to publicize his ideas to the world at large. By promising to pay Adkins royalties from the very outset of their relationship, Lear gained immediate access to ideas which it may well not have learned until the Patent Office published the details of Adkins' invention in 1960. At the core of this case, then, is the difficult question whether federal patent policy bars a State from enforcing a contract regulating access to an unpatented secret idea.[18]

Adkins takes an extreme position on this question. The inventor does not merely argue that since Lear obtained privileged access to his ideas *before 1960*, the company should be required to pay royalties accruing *before 1960* regardless of the validity of the patent which ultimately issued. He also argues that since Lear obtained special benefits before 1960, it should also pay royalties during the entire patent period (1960–1977), without regard to the validity of the Patent Office's grant. We cannot accept so broad an argument.

Adkins' position would permit inventors to negotiate all important licenses during the lengthy period while their applications were still pending at the Patent Office, thereby disabling entirely all those who have the strongest incentive to show that a patent is worthless. While the equities supporting Adkins' position are somewhat more appealing than those supporting the typical

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§ 1.14 (a) (1967). The parties do not contend that Adkins' patent application was publicized by the Office during the period it was under consideration.

[18] See Doerfer, The Limits on Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy, 80 Harv. L. Rev. 1432 (1967); Note, The *Stiffel* Doctrine and the Law of Trade Secrets, 62 Nw. U. L. Rev. 956 (1968); Adelman, Trade Secrets and Federal Pre-emption—the Aftermath of Sears and Compco, 49 J. Pat. Off. Soc. 713 (1967); Treece, Patent Policy and Preemption: The *Stiffel* and *Compco* Cases, 32 U. Chi. L. Rev. 80 (1964).

licensor, we cannot say that there is enough of a difference to justify such a substantial impairment of overriding federal policy.

Nor can we accept a second argument which may be advanced to support Adkins' claim to at least a portion of his post-patent royalties, regardless of the validity of the Patent Office grant. The terms of the 1955 agreement provide that royalties are to be paid until such time as the "patent . . . is held invalid," § 6, and the fact remains that the question of patent validity has not been finally determined in this case. Thus, it may be suggested that although Lear must be allowed to raise the question of patent validity in the present lawsuit, it must also be required to comply with its contract and continue to pay royalties until its claim is finally vindicated in the courts.

The parties' contract, however, is no more controlling on this issue than is the State's doctrine of estoppel, which is also rooted in contract principles. The decisive question is whether overriding federal policies would be significantly frustrated if licensees could be required to continue to pay royalties during the time they are challenging patent validity in the courts.

It seems to us that such a requirement would be inconsistent with the aims of federal patent policy. Enforcing this contractual provision would give the licensor an additional economic incentive to devise every conceivable dilatory tactic in an effort to postpone the day of final judicial reckoning. We can perceive no reason to encourage dilatory court tactics in this way. Moreover, the cost of prosecuting slow-moving trial proceedings and defending an inevitable appeal might well deter many licensees from attempting to prove patent invalidity in the courts. The deterrent effect would be particularly severe in the many scientific fields in which invention is proceeding at a rapid rate. In these areas, a patent may well become obsolete long before its

17-year term has expired. If a licensee has reason to believe that he will replace a patented idea with a new one in the near future, he will have little incentive to initiate lengthy court proceedings, unless he is freed from liability at least from the time he refuses to pay the contractual royalties. Lastly, enforcing this contractual provision would undermine the strong federal policy favoring the full and free use of ideas in the public domain. For all these reasons, we hold that Lear must be permitted to avoid the payment of all royalties accruing after Adkins' 1960 patent issued if Lear can prove patent invalidity.[19]

C.

Adkins' claim to contractual royalties accruing before the 1960 patent issued is, however, a much more difficult one, since it squarely raises the question whether, and to what extent, the States may protect the owners of *unpatented* inventions who are willing to disclose their ideas to manufacturers only upon payment of royalties. The California Supreme Court did not address itself to this issue with precision, for it believed that the venerable doctrine of estoppel provided a sufficient answer to all of Lear's claims based upon federal patent law. Thus, we do not know whether the Supreme Court would have awarded Adkins recovery even on his pre-patent royalties if it had recognized that previously established estoppel doctrine could no longer be properly invoked

[19] Adkins suggests that any decision repudiating licensee estoppel as the general rule should not be retroactively applied to contracts concluded before such a decision is announced. Given the extent to which the estoppel principle had been eroded by our prior decisions, we believe it clear that the patent owner—even before this decision—could not confidently rely upon the continuing vitality of the doctrine. Nor can we perceive that our decision today is likely to undermine any existing legitimate business relationships. Moreover, the public's interest in the elimination of specious patents would be significantly prejudiced if the retroactive effect of today's decision were limited in any way.

with regard to royalties accruing during the 17-year patent period. Our decision today will, of course, require the state courts to reconsider the theoretical basis of their decisions enforcing the contractual rights of inventors and it is impossible to predict the extent to which this re-evaluation may revolutionize the law of any particular State in this regard. Consequently, we have concluded, after much consideration, that even though an important question of federal law underlies this phase of the controversy, we should not now attempt to define in even a limited way the extent, if any, to which the States may properly act to enforce the contractual rights of inventors of unpatented secret ideas. Given the difficulty and importance of this task, it should be undertaken only after the state courts have, after fully focused inquiry, determined the extent to which they will respect the contractual rights of such inventors in the future. Indeed, on remand, the California courts may well reconcile the competing demands of patent and contract law in a way which would not warrant further review in this Court.

IV.

We also find it inappropriate to pass at this time upon Lear's contention that Adkins' patent is invalid.

Not only did Lear fail to raise this issue in its petition for certiorari, but the California Supreme Court has yet to pass on the question of patent validity in that clear and unequivocal manner which is so necessary for proper adjudication in this Court. As we have indicated, the California Supreme Court considered the novelty of Adkins' ideas relevant to its decision at only one stage of its extensive analysis. Since Lear claimed that it had developed its Michigan gyros completely independently of Adkins' efforts, the Supreme Court believed itself obliged to consider whether Adkins' ideas were not "entirely" anticipated by the prior art. 67 Cal. 2d, at 913, 435 P. 2d, at 340. Apply-

ing this test, the court upheld the jury's verdict of $888,000 on the Michigan gyros, finding that "Lear utilized the apparatus patented by Adkins throughout the period in question." 67 Cal. 2d, at 915, 435 P. 2d, at 341. In reaching this conclusion, however, the court did express its belief that Adkins' invention made a "significant step forward" in the art of gyroscopy. 67 Cal. 2d, at 915, 435 P. 2d, at 341.

It is far from clear that the court, in making this last statement, intended to hold that Adkins' ideas satisfied the demanding standard of invention explicated in our decision in *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966). Surely, such a holding was not required by the court's analysis, which was concerned only with the question whether Lear had benefited from Adkins' ideas in any degree. In this context, we believe that Lear must be required to address its arguments attacking the validity of the underlying patent to the California courts in the first instance.

The judgment of the Supreme Court of California is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

I concur in the judgment and opinion of the Court, except for what is said in Part III, C, of the Court's opinion. What the Court does in this part of its opinion is to reserve for future decision the question whether the States have power to enforce contracts under which someone claiming to have a new discovery can obtain payment for disclosing it while his patent application is pending, even though the discovery is later held to be unpatentable. This reservation is, as I see it, directly

in conflict with what this Court held to be the law in *Sears, Roebuck* v. *Stiffel Co.*, 376 U. S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964). Brother HARLAN concurred in the result in those cases, saying—contrary to what the Court held—"I see no reason why the State may not impose reasonable restrictions on the future 'copying' itself." *Compco, supra*, at 239. Consequently the Court is today joining in the kind of qualification that only MR. JUSTICE HARLAN was willing to make at the time of our *Stiffel* and *Compco* decisions.

I still entertain the belief I expressed for the Court in *Stiffel* and *Compco* that no State has a right to authorize any kind of monopoly on what is claimed to be a new invention, except when a patent has been obtained from the Patent Office under the exacting standards of the patent laws. One who makes a discovery may, of course, keep it secret if he wishes, but private arrangements under which self-styled "inventors" do not keep their discoveries secret, but rather disclose them, in return for contractual payments, run counter to the plan of our patent laws, which tightly regulate the kind of inventions that may be protected and the manner in which they may be protected. The national policy expressed in the patent laws, favoring free competition and narrowly limiting monopoly, cannot be frustrated by private agreements among individuals, with or without the approval of the State.

MR. JUSTICE WHITE, concurring in part.

The applicable provision of 28 U. S. C. § 1257 empowers us to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the

United States." Although Adkins disputes it, we have jurisdiction to consider whether a patent licensee is estopped to challenge the validity of the patent. The California Supreme Court ruled that he is and therefore would not entertain attacks on Adkins' patent as a defense to his suit for royalties. Lear seeks review of that holding here. In my view, not only is the issue properly here but the Court has correctly decided it.

Although we have jurisdiction to review this state court judgment and to determine the licensee estoppel issue, it does not necessarily follow that we may or should deal with two other federal questions which come into focus once the licensee is free to challenge the patent. The first is whether the patent is valid. The second, which arises only if the patent is invalidated, is whether federal law forbids the collection of royalties which might otherwise be collectible under a contract rooted in state law. Although the Court does not deal with the first issue, it does purport to decide the second, at least in part. However, as either a jurisdictional or a policy matter, neither of these issues is properly before us in this case.

In the first place, we have no decision of the California Supreme Court affirming or denying, as a matter of federal law, that Adkins may not enforce his contract if his patent is held invalid. The California court held that the license agreement had not been terminated in accordance with its terms, that the doctrine of licensee estoppel prevented Lear from challenging the patent and that Lear was utilizing the teaching of Adkins' patent. There was thus no necessity or reason to consider whether the patent was invalid, or, if it was, whether either state or federal law prevented collection of the royalties reserved by the contract. Even if these issues had been presented to the California Supreme Court, sound principles would have dictated that the court not render a

decision on questions unnecessary to its disposition of the case. See, *e. g., Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212–213 (1938).

There is no indication, however, that Lear, directly or by inference, urged in the California courts that if Adkins' patent were invalid, federal law overrode state contract law and precluded collection of the royalties which Lear had promised to pay. One of the defenses presented by Lear in its answer to Adkins' claim for royalties was that there had been a failure of consideration because of the absence of bargained-for patentability in Adkins' ideas. But failure of consideration is a state law question, and I find nothing in the record and nothing in this Court's opinion indicating that Lear at any time contended in the state courts that once Adkins' patent was invalidated, the royalty agreement was unenforceable as a matter of federal law.[1]

Given Lear's failure below to "specially set up or claim" the federal bar to collection of royalties in the

[1] The Court brushes aside the problem by characterizing the additional issue it decides as representing a "more complicated estoppel problem." But licensee estoppel, the question raised here, refers to estoppel against the licensee to challenge the patent, not to any bar or "estoppel" interposed by federal law against collecting royalties on an invalidated patent. Whether Adkins can enforce his contract for royalties if his patent is found to be invalid cannot be shoehorned into the licensee-estoppel question, and by no stretch of the imagination can it be included within the scope of the question raised and litigated by the parties in this case. In the courts below Lear wanted to challenge Adkins' patent only for the purpose of showing that Adkins was entitled to no recovery under the terms of the contract itself, either because of a failure of consideration or because the contract had been legally terminated or could be legally terminated. Indeed, the District Court of Appeal noted: "Lear concedes that it would be estopped to contest the validity of any patent issued to Adkins on the claims of his application described in the license agreement so long as it continued to operate under that agreement." 52 Cal. Rptr. 795, 805. See also Lear's Opening Brief in the District Court of Appeal 109.

event Adkins' patent was invalidated, and without the California Supreme Court's "final judgment" on this issue, I doubt our jurisdiction to decide the issue. But even if jurisdiction exists, the Court should follow its characteristic practice and refuse to issue pronouncements on questions not urged or decided in the state courts.

In *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430 (1940), the Court, while recognizing it had jurisdiction to determine whether a New York tax was an unconstitutional burden on interstate commerce, refused to consider whether the tax was a prohibited impost or duty on imports and exports, saying: "[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [the Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . [D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *Id.*, at 434.

Wilson v. *Cook*, 327 U. S. 474 (1946), reached a similar conclusion. There the Court denied a government contractor the benefit of the implied constitutional immunity of the Federal Government from taxation by the State, but at the same time declined to consider whether the state tax at issue placed a forbidden tax directly on the United States. This was because the Court was "not free to consider" a ground of attack "not presented to the Supreme Court of Arkansas or considered or decided by it," even though the issue was in some measure related to one actually decided by the state courts and arose under the same implied constitutional immunity argument. *Id.*, at 483. Cf. *Dewey* v. *Des Moines*, 173 U. S. 193, 197–198 (1899). The Court relied on *McGoldrick* and a long line of prior cases, including *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317 (1937),

where the Court had said: "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The result is the same when a party has attempted to raise an issue in the state court but has not done so in proper or timely fashion. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128 (1945). "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here." *CIO* v. *McAdory*, 325 U. S. 472, 477 (1945). And no different conclusion obtains when the federal question, although not yet presented to or decided by the state court, will probably or even certainly arise during further proceedings held in that court. See, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449, 466–467 (1958); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, 394–395 (1964).

Wholly aside from jurisdictional considerations or those relating to our relationships with state courts, there is the matter of our own Rule 23 (1)(c), which states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." See *Flournoy* v. *Wiener*, 321 U. S. 253, 259 (1944). None of the questions presented by Lear's petition for certiorari comes even close to the issue to which the Court now addresses itself—an issue which will arise only if Lear can and does challenge the patent, if the patent is declared invalid, if Adkins nevertheless seeks to enforce the agreement, and if Lear interposes a defense based on federal law.

This seems a poor case for waiving our Rules. In the first place, the question of validity has not been reached by the California Supreme Court, and when it is the patent may withstand attack. In that event there will be no necessity to consider the impact of patent law on the enforceability of a contract grounded in state law. Second, even if the patent is declared invalid, the state court, after the parties have addressed themselves to the issues, may accommodate federal and state law in a matter which would not prompt review here. Third, the parties themselves have neither briefed nor seriously argued the question in this Court, and we do not have the benefit of their views on what is surely a difficult question. The Court itself has flushed the issue, which it now deals with on a piecemeal basis.[2] Like the question of patent validity, I would leave the consequences of invalidity to the state court in the first instance.

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[2] The Court's opinion flatly proscribes recovery by Adkins of "all royalties accruing after Adkins' 1960 patent issued if Lear can prove patent invalidity." *Ante*, at 674. But recovery of pre-1960 royalties is left open by the Court, apparently because pre-issuance and post-issuance royalties do not stand on the same footing under federal law. Such a distinction may be valid, and pre-1960 royalties recoverable; but if so, what of post-1960 royalties which are attributable to the headstart Lear obtained over the rest of the industry as a result of pre-issuance disclosure of Adkins' idea? Today's bar to collection of post-1960 royalties would seem to be inflexible, and yet those royalties arguably are recoverable to the extent they represent payment for the pre-1960 disclosure of Adkins' idea; to that extent, they seem indistinguishable from pre-1960 royalties, at least for purposes of federal patent law. Cf. *Brulotte* v. *Thys Co.*, 379 U. S. 29, 31 (1964). See also *id.*, at 34–39 (dissenting opinion). This possibility and others serve to indicate the wisdom of refraining from any pronouncement now, and particularly from any rigid line drawing, in advance of consideration by the courts below and by the parties.

NOYD *v.* BOND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 830. Argued April 24, 1969.—Decided June 16, 1969.

Petitioner, an Air Force officer at Cannon Air Force Base, was found guilty by a court-martial of wilfully disobeying a lawful order. He was sentenced, *inter alia*, to a year's confinement at hard labor and immediately ordered confined to his quarters. The convening authority approved the sentence and ordered petitioner confined in the U. S. Disciplinary Barracks at Fort Leavenworth, Kans., pending completion of appellate review. Petitioner (1) appealed on the merits to the military tribunals (where final review is pending) and (2) sought habeas corpus relief from the District Court, arguing that Articles 71 (c) and 13 of the Uniform Code of Military Justice required his release pending the outcome of his military appeal. The District Court, overruling the Government's contention that petitioner should be required to exhaust his military remedies before seeking habeas corpus relief from the civilian courts, found petitioner's incarceration at Fort Leavenworth would be invalid under Article 71 (c). That court refused to review the legality of petitioner's confinement at Cannon Air Force Base. The Court of Appeals, relying on *Gusik* v. *Schilder*, 340 U. S. 128, reversed, and held that the District Court could not grant petitioner relief until he had challenged the validity of his confinement before the military appellate tribunals. Shortly after the Court of Appeals decision, petitioner recognized that his sentence was scheduled to expire and he might be released from custody before this Court had an opportunity to pass on his claims regarding his confinement and that his case might become moot. The Court of Appeals on petitioner's request agreed to stay its mandate but refused to require petitioner's release from custody at the Cannon Air Force Base. MR. JUSTICE DOUGLAS, following petitioner's application to him during a recess of this Court, ordered that petitioner be placed in "a non-incarcerated status" until the full Court could pass on the matter, and petitioner was released two days before his sentence was to expire. The Government contended that petitioner's case had nevertheless become moot, arguing that MR. JUSTICE DOUGLAS'

order did not come within the category of a "suspension," which under Article 57 (b) tolls the running of a sentence. *Held:*

1. The case is not moot. MR. JUSTICE DOUGLAS' order, even if it did not constitute a "suspension" under Article 57 (b), was sufficient to interrupt the running of petitioner's sentence under the rationale of § 97 (c) of the Manual for Courts-Martial that a military prisoner who has been freed from confinement may not receive credit for time served during the period of his release. Pp. 688–693.

2. Habeas corpus petitions from military prisoners should not be entertained by civilian courts until all available remedies within the military court system have been exhausted, *Gusik* v. *Schilder*, *supra;* and since this principle applies with equal force to ancillary matters such as the legality of petitioner's confinement pending completion of military review, petitioner's failure to exhaust his remedy in the Court of Military Appeals forecloses the relief requested here. Pp. 693–698.

402 F. 2d 441, affirmed.

Marvin M. Karpatkin argued the cause for petitioner. With him on the brief were *Melvin L. Wulf, William F. Reynard, Alan H. Levine, Rhoda H. Karpatkin,* and *Michael N. Pollet.*

James VanR. Springer argued the cause for respondents. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Joseph J. Connolly, Beatrice Rosenberg,* and *Roger A. Pauley.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner is a career officer in the Air Force who has come to believe that this country's participation in the Vietnamese conflict is unjust and immoral. Having decided that he would do nothing to further the Nation's military effort in Southeast Asia, Captain Noyd refused to obey an order, issued December 5, 1967, requiring him

to teach one of the junior officers at the Cannon Air Force Base, New Mexico, to fly a military airplane.[1]

In response, Major General Charles Bond, Jr., the Commander of the Twelfth Air Force, convened a general court-martial at the Cannon Base. On March 8, 1968, the court-martial found Noyd guilty of wilfully disobeying a lawful order; on the following day petitioner was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. As soon as the court-martial announced its sentence, Captain Noyd was ordered confined to his quarters. The court-martial's judgment was then forwarded to General Bond for the review required by 10 U. S. C. § 864, and on May 10, 1968, the General approved the sentence, ordering that: "Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas."

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[1] Before this incident took place, Captain Noyd sought to invoke the jurisdiction of the civilian federal courts in an effort to require the Air Force either to assign him to duties consistent with his beliefs or to dismiss him. The United States District Court for the District of Colorado denied relief because petitioner had not yet been court-martialed for refusing to obey orders and so had not fully exhausted his remedies within the military system. *Noyd* v. *McNamara*, 267 F. Supp. 701 (1967). The Court of Appeals for the Tenth Circuit affirmed, 378 F. 2d 538, and this Court denied certiorari, 389 U. S. 1022 (1967). The Courts of Appeals for the Second and Fifth Circuits have, however, subsequently decided that the exhaustion doctrine did not necessarily require a serviceman to await the military's decision to convene a court-martial before seeking relief in the civilian courts. *Hammond* v. *Lenfest*, 398 F. 2d 705 (C. A. 2d Cir. 1968); *In re Kelly*, 401 F. 2d 211 (C. A. 5th Cir. 1968). Cf. *Brown* v. *McNamara*, 387 F. 2d 150 (C. A. 3d Cir. 1967). We have not found it necessary to resolve this conflict among the circuits in order to decide the narrow issue in this case.

At this point, petitioner's attorneys undertook two courses of action. On the one hand, they appealed the merits of petitioner's conviction to the Air Force Board of Review, which is the appellate military tribunal Congress has established to oversee the administration of criminal justice in petitioner's branch of the Armed Forces. On the other hand, they sought habeas corpus relief from the civilian courts, arguing that the Uniform Code of Military Justice required that petitioner be released from confinement pending the outcome of his military appeal.

At the present time, petitioner's appeal from his conviction is still pending in the higher reaches of the military court system. While the Air Force Board of Review has now affirmed the judgment of the court-martial, the Court of Military Appeals, the highest military tribunal, has agreed to review Captain Noyd's case. Petitioner does not suggest that we may properly interfere with the orderly process of military review by considering the merits of his conviction at this juncture. Rather, we are now only asked to vindicate his asserted right to remain free from confinement while the validity of his conviction is still being litigated in the appellate military courts.

I.

Captain Noyd's effort to invoke the assistance of the civilian courts was precipitated by General Bond's order transferring petitioner to the disciplinary barracks at Fort Leavenworth. Shortly after the order was issued, and before it was carried out, petitioner sought a writ of habeas corpus from the United States District Court for the District of New Mexico, arguing that both his confinement at the Cannon Air Force Base and his proposed transfer to Fort Leavenworth were in violation of two provisions of the Uniform Code of Military Justice.

First, petitioner contended that his confinement constituted an attempt to "execute" his sentence in violation of Article 71 (c) of the Code, which provides:

> "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be *executed* until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." 10 U. S. C. § 871 (c). (Emphasis supplied.)

Second, petitioner argued that Article 13 of the Code [2] only authorized confinement of a convicted serviceman pending his appeal after the military has found that restraint is necessary to prevent the serviceman's flight from the jurisdiction. Since no such finding has been made in this case, petitioner argued that the civilian court should require his complete release.

The Government, in addition to opposing Captain Noyd's claims on the merits, argued that petitioner should be required to exhaust his military remedies before seeking habeas corpus relief from the civilian courts. The District Court, however, refused to apply the exhaustion principle in the present case, finding that the military court system did not provide petitioner with an adequate remedy by which he could test the validity of his confinement, pending appeal, in an expedited man-

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[2] This provision of the Code reads:

"Art. 13. Punishment prohibited before trial.

"Subject to section 857 of this title [Article 57 of the Code], no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline." 10 U. S. C. § 813.

ner. Turning to the merits, the District Judge granted petitioner part of the relief he requested. While the court refused to review the legality of Noyd's confinement at the Cannon Air Force Base, the court did find that petitioner's incarceration at Fort Leavenworth would constitute an "execution" of his sentence in violation of Article 71 (c), and so declared General Bond's order invalid.[3]

Both sides appealed to the Court of Appeals for the Tenth Circuit, which reversed the District Court's grant of partial relief. Relying on this Court's decision in *Gusik* v. *Schilder*, 340 U. S. 128 (1950), a unanimous panel held that the District Court could not properly grant petitioner any form of relief until he had first challenged the validity of his confinement before the appellate tribunals within the military system. The court emphasized that "the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ" if a serviceman could demonstrate that he was illegally restrained pending appeal, and it could perceive no justification for petitioner's failure to seek the military court's assistance. 402 F. 2d 441, 442-443. We granted certiorari to consider the propriety of the application of the rule of *Gusik* v. *Schilder* in the circumstances of this case. 393 U. S. 1048 (1969).

II.

Shortly after the Court of Appeals announced its decision, petitioner recognized that since his sentence was

[3] After the District Court held that petitioner could not be lawfully transferred to Fort Leavenworth, the military significantly increased the degree of restraint that was imposed upon Captain Noyd at the Cannon Air Force Base. Petitioner was permitted to see his family only twice each week and was forbidden to leave his quarters except for narrowly limited purposes. See Letter Regarding Arrest in Quarters, from Col. George R. Doerr, Appendix 32–34.

scheduled to expire on December 26, 1968,[4] he might well be released from custody before this Court would have an opportunity to pass upon his claims for relief pending his appeal to the military courts. In order to avoid the possibility of mootness, petitioner promptly requested the Court of Appeals to stay its mandate and order his release pending this Court's decision on his petition for certiorari. On December 6, the Court of Appeals agreed to stay its mandate, thereby keeping the District Court's order in effect, but refused to require the military to release Captain Noyd from custody at the Cannon Air Force Base.

Petitioner then applied to MR. JUSTICE WHITE, Circuit Justice for the Tenth Circuit, for temporary release from all confinement pending this Court's action on his certiorari petition. When the Circuit Justice denied this application on December 18, 1968, a second motion of the same tenor was made to MR. JUSTICE DOUGLAS on the following day. Noting that the Court was then in recess and would not meet again until January 10, 1969, MR. JUSTICE DOUGLAS ordered that "petitioner . . . be placed in a non-incarcerated status" until the full Court could have an opportunity to pass on the issues raised in a considered manner. Pursuant to MR. JUSTICE DOUGLAS' order, petitioner was released from confinement on Christmas Eve, two days before his sentence was scheduled to expire.[5]

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[4] While petitioner's one-year sentence began to run on March 9, 1968, when it was announced by the court-martial, the Air Force awarded him sentence credits for good behavior, thereby permitting him to obtain his release from custody after a period of some nine and one-half months.

[5] When this Court granted certiorari on January 20, 1969, we also ordered that the "[s]tay heretofore granted by MR. JUSTICE DOUGLAS shall remain in effect pending issuance of judgment of this Court or until further order of this Court." 393 U. S. 1048.

Despite MR. JUSTICE DOUGLAS' order of release, the Government now suggests that this case has become moot. It claims that under the applicable military law, a judicial order that petitioner be placed in a "non-incarcerated status" was insufficient to toll petitioner's sentence, which continued to run until it expired of its own force on December 26. The Government bases this claim upon its reading of Article 57 (b) of the Uniform Code of Military Justice:

> "Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement." 10 U. S. C. § 857 (b).

Citing interpretive military regulations, the Government understands the statute to establish the general rule that "[t]he date the sentence of a court-martial is adjudged will mark the beginning of a sentence to confinement *whether or not the accused had then been placed in confinement.*" Apprehension and Confinement: Military Sentences to Confinement, AR 633–30; AFR 125–30. (Emphasis supplied.)

Petitioner does not disagree with the Government's understanding of the general rule, but relies on that part of the statute which expressly provides that a sentence may be tolled if it is "suspended" and the serviceman is placed on probation. Petitioner argues that since MR. JUSTICE DOUGLAS' order, and this Court's confirmance of it, had the obvious purpose to preserve the *status quo* pending the full Court's consideration of the merits of his certiorari petition, the order should be understood to have "suspended" petitioner's sentence within the meaning of the statutory exception to the general rule. In response, the Government emphasizes that MR. JUSTICE DOUGLAS'

order did not expressly "suspend" petitioner's sentence and so contends that the statutory exception is not applicable in this instance.

We find it unnecessary to decide this question. For even if MR. JUSTICE DOUGLAS' order did not satisfy the statutory exception, we hold that it was sufficient to interrupt the running of petitioner's sentence. Like the Court of Military Appeals, we do not believe that Congress intended that the general rule stated in Article 57 (b) be inexorably applied in all situations which do not fall within the "suspension of sentence" exception:

> "Congress did not mention all contingencies which would prevent an accused from being credited with time served. Common sense suggests that if an accused escaped from confinement, his period of service would be interrupted and he would be required to make up the time at the end of the period." *United States* v. *Bryant*, 12 U. S. C. M. A. 133, 137, 30 C. M. R. 133, 137 (1961).

We think it equally clear that Article 57 (b) was not intended to give a litigious serviceman a bonus when he obtains temporary release from confinement the military was seeking to impose. Rather, the statute serves to protect a convicted serviceman whom the military wishes to release from confinement before his term has run. If a serviceman's commanding officer simply releases him from confinement without "suspending" his sentence, the Code does not demand that the serviceman be given a hearing before he is reincarcerated. In contrast, the Code demands that once a sentence is "suspended," it may not be reinstated unless the accused is given a hearing, at which he is represented by counsel, in order to determine whether he has violated the conditions of his probation. 10 U. S. C. § 872 (a). Article 57 (b), then, represents Congress' decision that even though a man is temporarily set at liberty, he should be given sentence

credit unless he is sure that his freedom will not be curtailed at a later date without a plenary hearing. Obviously, the statute's purpose will not be served in the present case, where Captain Noyd's liberty will only be limited once again after a full argument before the judiciary.

In recognition of this fact, the Manual for Courts-Martial has, since its promulgation in 1951, required that a serviceman not be given credit for the time during which he has obtained release from confinement in cases like the present one. The Manual, which has the force of law unless it is "contrary to or inconsistent with" the Uniform Code Congress has enacted, 10 U. S. C. § 836 (a), provides:

> "A sentence to confinement . . . is continuous until the term expires, with certain exceptions. These exceptions include the following:
>
> . . . . .
>
> "Periods during which the person undergoing such a sentence is absent without authority . . . or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is *erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal* . . . ." § 97 (c), Manual for Courts-Martial, United States (1951). (Emphasis supplied.)

Thus, the Manual requires that a serviceman receive no sentence credit for the period he has avoided confinement if the judicial decision granting him freedom is reversed on appeal. It follows *a fortiori* that the principles established in the Manual require that Captain Noyd be denied sentence credit as well. For in the present litigation, petitioner has not convinced *any* court that he may properly be relieved from all confinement. Petitioner

obtained his release from MR. JUSTICE DOUGLAS simply by showing that his chances of success on the merits were sufficiently great to warrant the grant of interlocutory relief. Surely, he is not entitled to more favorable sentencing treatment than the serviceman who has at least convinced one court that his claim to release is legally sound but whose arguments have not been upheld on appeal.

We hold that the principles of the Manual for Courts-Martial operated to interrupt the running of Captain Noyd's sentence at the time of his release on December 24, 1968, and hence that the case before us is not moot.

III.

We now turn to consider whether petitioner could properly seek his release in civilian courts without making any effort to invoke the assistance of the courts within the military system. *Gusik* v. *Schilder*, 340 U. S. 128 (1950), established the general rule that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain. MR. JUSTICE DOUGLAS, for a unanimous Court, explained some of the important reasons which require civilian courts to respect the integrity of the military court system that Congress has established:

> "An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. . . . The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked

> to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile." *Id.*, at 131–132.

It is true, of course, that the principles of federalism which enlighten the law of federal habeas corpus for state prisoners are not relevant to the problem before us. Nevertheless other considerations require a substantial degree of civilian deference to military tribunals. In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts.

It is for these reasons that Congress, in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces," [6] has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

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[6] Constitution of the United States, Art. I, § 8, cl. 14.

Almost one year before petitioner sought habeas corpus relief from the Federal District Court sitting in New Mexico, the Court of Military Appeals had held that it would, in appropriate cases, grant the relief petitioner now demands from us. *Levy* v. *Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399 (1967).[7] Petitioner, however, has made no effort to invoke the jurisdiction of the Court of Military Appeals. Nevertheless, he would have civilian courts intervene precipitately into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad.

Petitioner emphasizes that in the present case we are not called upon to review prematurely the merits of the court-martial proceeding itself. Instead, we are merely asked to determine the legality of petitioner's confinement while he is exercising his right of appeal to the

[7] The Government does not renew the arguments it has on occasion advanced before the Court of Military Appeals, see Brief in Support of Motion to Strike and Dismiss Petition, *United States* v. *Frischholz*, Docket No. 14,270 (1965), to the effect that the Court of Military Appeals lacks the power to grant emergency writs. In its decision in the *Frischholz* case, 16 U. S. C. M. A. 150, 36 C. M. R. 306 (1966), the Court of Military Appeals properly rejected the Government's argument, holding that the All Writs Act, 28 U. S. C. § 1651 (a), permitted it to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction." Since the All Writs Act applies by its terms to any "courts established by Act of Congress," and since the Revisers of 1948 expressly noted that "[t]he revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts," we do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. *United States* v. *Bevilacqua*, 18 U. S. C. M. A. 10, 39 C. M. R. 10 (1968).

higher military courts. It is said that there is less justification for deference to military tribunals in ancillary matters of this sort. We cannot agree. All of the reasons supporting this Court's decision in *Gusik* v. *Schilder, supra,* are applicable here. If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance. Moreover, if we were to reach the merits of petitioner's claim for relief pending his military appeal, we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.[8]

Petitioner contends, however, that the Court of Military Appeals cannot be expected to protect his rights in a fully effective way. His principal argument is based on the simple fact that the Court of Military Appeals sits exclusively in Washington, D. C. Thus, before a service-

[8] Petitioner contends that our decisions in *Toth* v. *Quarles,* 350 U. S. 11 (1955); *Reid* v. *Covert,* 354 U. S. 1 (1957); and *McElroy* v. *Guagliardo,* 361 U. S. 281 (1960), justify his position that exhaustion of military remedies is not required in this case. The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complainants' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us.

man may invoke its habeas corpus jurisdiction, he must somehow obtain a lawyer willing and able to conduct a lawsuit in the Nation's Capital. It is said that this practical difficulty makes it clear that the Court of Military Appeals cannot provide petitioner with adequate relief.

This argument seems to us far too sweeping to be acceptable. Individuals convicted of crime in the civil judicial system are often obliged to appeal to state courts which are far distant from the place at which they are incarcerated. Nevertheless, this fact alone has never been considered sufficient to permit a federal district court to consider a petition for habeas corpus without demanding that the prisoner exhaust all of the presently available remedies offered by the State's appellate courts. Similarly, the fact that Captain Noyd is confined far from Washington, D. C., is not enough, standing alone, to permit him to circumvent the military court system.

Noyd argues, however, that the great distance of the Court of Military Appeals is of special significance in cases like the present one, where speed is essential if relief is to be at all effective. But petitioner concedes that the Court of Military Appeals has thus far acted speedily when confronted with an application for an emergency writ,[9] and there is no reason to believe that the court would not have responded rapidly if Captain Noyd had sought its assistance.[10] Nor has petitioner

[9] In *Levy* v. *Resor*, *supra*, a petition for emergency relief was filed on June 20, 1967. The Court of Military Appeals promptly ordered oral argument and filed a full opinion on July 7, 1967. Both the petitioner and the Government indicate that a subsequent habeas corpus application filed by Captain Levy was ruled on by the Court of Military Appeals within five days after its submission.

[10] Consequently, we need not decide how long a serviceman must wait for a decision on his application by the Court of Military Appeals before he may petition for a writ of habeas corpus from the appropriate civilian court.

ever suggested that it was impossible for him to obtain a lawyer who was willing to present an appropriate application before the Court of Military Appeals with the requisite dispatch.

Instead, petitioner simply argues that other servicemen in other situations could conceivably have great difficulty in obtaining a lawyer who was able to move quickly before the military court sitting in Washington. Moreover, it is said that the Court of Military Appeals would be inundated with applications for emergency writs if all servicemen in petitioner's position were required to seek relief within the military system. It will be time enough, however, to consider these problems when, and if, they arise. It may be that situations like the present one are unusual, or that the Court of Military Appeals will be able to announce clear rules as to the proper treatment of convicted prisoners pending appeal, or that Congress will act to facilitate the hearing of applications for emergency writs within the military system. Since petitioner has at no time attempted to show that prompt and effective relief was unavailable from the Court of Military Appeals in his case, we hold that petitioner's failure to exhaust this remedy before seeking the assistance of the civilian courts is not excused.[11]

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[11] The Government suggests that petitioner should also be required to exhaust a second remedy allegedly afforded him within the military system. It is said that Captain Noyd should have requested the Air Force Board of Review to release him pending the exhaustion of his rights of appeal. The Government, however, cites no decision of a Board of Review which asserts the power to grant emergency interlocutory relief prior to the Board's consideration of a case on the merits; nor are we referred to any statute which unequivocally grants this authority. In the absence of any attempt by the Boards of Review to assert such a power, we do not believe that petitioner may properly be required to exhaust a remedy which may not exist. Cf. *Union Pacific R. Co.* v. *Weld County*, 247 U. S. 282 (1918); *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946).

Accordingly, the judgment of the Court of Appeals is affirmed. In light of the substantial questions raised by petitioner, however, we think it plain that petitioner in no sense acted in bad faith when he failed to exhaust his military remedies before invoking the jurisdiction of the District Court. Consequently, we consider it appropriate for us to continue MR. JUSTICE DOUGLAS' order in effect until our mandate issues, in order to give petitioner an opportunity to present his arguments to the Court of Military Appeals. See 28 U. S. C. § 1651 (a); cf. *Phillips* v. *United States*, 312 U. S. 246, 254 (Mr. Justice Frankfurter). While it is true that Captain Noyd has only two days yet to serve on his sentence, he should not be required to surrender his freedom for even this short time unless it is found that the law so requires.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE WHITE, dissenting.

The petition for certiorari in this case sought a determination that petitioner was being subjected to illegal restraints pending the appeal of his court-martial conviction to the appropriate tribunals. Since his sentence had begun to run at the time it was imposed, it would have expired on December 26, 1968, unless suspended or otherwise interrupted. Hence when the petition was filed here, the most petitioner had to gain from this litigation, which does not reach the merits of his conviction, was that for the duration of his sentence—two days at the time MR. JUSTICE DOUGLAS ordered his release from confinement—he was not to be subject to the restraints then being imposed on him. Surely this is a picayune issue which does not warrant decision here in any event, either alone or in conjunction with the

exhaustion question. Petitioner should not have brought the custody question to the federal courts in the first place; and by the same token, if to preserve the issue he desired suspension of his sentence or its equivalent, that matter also should have been presented first to the military tribunals rather than to the District Court. I would dismiss the writ as improvidently granted.

CIPRIANO *v.* CITY OF HOUMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 705. Argued April 24, 1969.—Decided June 16, 1969.

Louisiana law provides that only "property taxpayers" have the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility system. At a special election a majority of the property taxpayers approved a bond issue for the City of Houma's municipally owned utility systems. Within the period permitted to contest the election result appellant, a nonproperty taxpayer otherwise qualified to vote, brought suit for himself and others similarly situated to enjoin the issuance of the bonds and to obtain a declaratory judgment that the limitation of the franchise to property taxpayers is unconstitutional. A three-judge District Court held the limitation constitutional. *Held:*

1. The "property taxpayer" limitation on the franchise violates the Equal Protection Clause of the Fourteenth Amendment. *Kramer* v. *Union Free School District No. 15, ante,* p. 621.

(a) Where the State grants the right to vote in a limited purpose election to some qualified voters and denies it to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer, supra,* at 627.

(b) Here the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike, and the classification thus unconstitutionally excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted on as those who are permitted to vote.

2. This decision will have prospective effect, and will apply only where the time for challenging the election result has not expired, or in cases brought within the time specified for challenging the election and which are not yet final.

286 F. Supp. 823, reversed and remanded.

Kenneth Watkins argued the cause and filed briefs for appellant.

Eugene E. Huppenbauer, Jr., argued the cause for appellees. With him on the brief was *Ted J. Borowski.*

Briefs of *amici curiae* were filed by *Jack P. F. Gremillion*, Attorney General, and *John V. Parker* for the State of Louisiana et al., and by *Irving A. Jennings, J. A. Riggins, Jr.*, and *Rex E. Lee* for the Salt River Project Agricultural Improvement & Power District.

PER CURIAM.

In this case we must determine whether provisions of Louisiana law which give only "property taxpayers" the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility are constitutional. This case thus presents an issue similar to the one considered in *Kramer* v. *Union Free School District No. 15, ante*, p. 621. With one judge dissenting, a three-judge District Court determined that the Louisiana provisions were constitutional. However, as in *Kramer*, we find that the challenged provisions violate the Equal Protection Clause of the Fourteenth Amendment; we therefore reverse.

The Louisiana Constitution provides that the legislature may authorize municipalities to issue bonds "[f]or the purpose of constructing, acquiring, extending or improving any revenue-producing public utility." La. Const., Art. 14, § 14 (m). Pursuant to this provision, the legislature enacted legislation authorizing Louisiana municipalities to issue revenue bonds. La. Rev. Stat. § 33:4251 (1950).[1] The legislature further provided, however, that the municipalities could issue the bonds

[1] The amount of debt a municipality may incur is limited by the Louisiana Constitution. La. Const., Art. 14, § 14 (f). These revenue bonds are not included in computing the municipal debt, however, if they are secured exclusively by a mortgage on the assets of the utility system and a pledge of the system revenues. La. Const., Art. 14, § 14 (m).

only if they were approved by a "majority in number and amount of the property taxpayers qualified to vote . . . [who vote at the bond election]." [2] La. Rev. Stat. § 39:501 (1950). See also La. Rev. Stat. §§ 33:4258, 39:508 (1950).

Appellee City of Houma owns and operates gas, water, and electric utility systems. In September 1967 the city officials scheduled a special election to obtain voter approval for the issuance of $10,000,000 of utility revenue bonds. The city planned to finance extension and improvement of the municipally owned utility systems with the bond proceeds. At the special election a majority "in number and amount" of the property taxpayers approved the bond issue. However, within the period provided by Louisiana law for contesting the result of the election, La. Rev. Stat. § 33:4260 (1950), this suit was instituted in the United States District Court for the Eastern District of Louisiana.

Appellant alleged that he was a duly qualified voter [3] of the City of Houma, and that he had been prevented from voting in the revenue bond election solely because he was not a property owner. He sued for himself and for a class of 6,926 nonproperty taxpayers otherwise qualified as City of Houma voters. Appellant sought to enjoin the issuance of the bonds approved at the special election and to obtain a declaratory judgment that the limitation of the franchise to property taxpayers is unconstitutional. A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281, 2284. The

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[2] We were informed at oral argument that "number and amount" means the bonds must be approved by a majority of the property taxpayers voting and their votes must also represent a "majority of the assessed property owned by those taxpayers who are actually voting."

[3] The qualifications are of age, residence, and registration. See La. Rev. Stat. § 39:508 (1950).

court then dismissed the suit, finding the Louisiana provisions constitutional. *Cipriano* v. *City of Houma*, 286 F. Supp. 823 (D. C. E. D. La. 1968). Appellant brought a direct appeal to this Court, 28 U. S. C. § 1253; we noted probable jurisdiction. 393 U. S. 1061 (1969).

As we noted in *Kramer, supra,* if a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others,[4] "the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union Free School District No. 15, supra,* at 627. Moreover, no less showing that the exclusions are necessary to promote a compelling state interest is required merely because "the questions scheduled for the election need not have been submitted to the voters." *Id.,* at 629, n. 11.

The appellees maintain that property owners have a "special pecuniary interest" in the election, because the efficiency of the utility system directly affects "property and property values" and thus "the basic security of their investment in [their] property [is] at stake." Assuming, *arguendo,*[5] that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also "specially interested" in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on "whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Id.,* at 632.

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[4] Appellant does not challenge any other voter qualification regulations. The sole issue in this case is the constitutionality of the provisions of Louisiana law permitting only property taxpayers to vote in utility bond elections.

[5] As in *Kramer* v. *Union Free School District No. 15, supra,* we find it unnecessary to decide whether a State might, in some circumstances, limit the franchise to those "primarily interested."

At the time of the election, only about 40% of the city's registered voters were property taxpayers. Of course, the operation of the utility systems—gas, water, and electric—affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding.[6] Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates.

The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike.

Moreover, the profits of the utility systems' operations are paid into the general fund of the city and are used to finance city services that otherwise would be supported by taxes. Of course, property taxpayers may be concerned with expanding and improving the city's utility operations; such improvements could produce revenues which eventually would reduce the burden on the property tax to support city services. On the other hand, nonproperty taxpayers may feel that their interests as rate payers indicate that no further expansion of utility debt obligations should be made. Of course, these differences of opinion cannot justify excluding either group from the bond election, when, as in this case, both are substantially affected by the utility opera-

[6] For example, a proposed decrease in utility rates may be forestalled by the issuance of new revenue bonds.

tions. For, as we noted in *Carrington* v. *Rash*, 380 U. S. 89, 94 (1965), "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."

The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a "rational basis" for limiting the franchise to those voters with a "special interest," the statute clearly does not meet the "exacting standard of precision we require of statutes which selectively distribute the franchise." *Kramer* v. *Union Free School District No. 15, supra,* at 632. We therefore reverse the judgment of the District Court.

Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940). Cf. *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization.

The judgment of the District Court is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the judgment of the Court. Unlike *Kramer* v. *Union Free School District No. 15, ante,* p. 621, this case involves a voting classification "wholly irrelevant to achievement" of the State's objective. *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 556.

MR. JUSTICE HARLAN, while adhering to his views expressed in dissent in *Reynolds* v. *Sims,* 377 U. S. 533, 589 (1964); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 680 (1966); and *Avery* v. *Midland County,* 390 U. S. 474, 486 (1968), but considering himself bound by the Court's decisions in those cases, concurs in the result.

BANKS *v.* CALIFORNIA.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 670. Argued April 23, 1969.—Decided June 16, 1969.

Certiorari dismissed.

Thomas J. Klitgaard, by appointment of the Court, 393 U. S. 931, argued the cause and filed briefs for petitioner.

Edward P. O'Brien, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch*, Attorney General, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Louise H. Renne*, Deputy Attorney General.

PER CURIAM.

Petitioner did not ask the Supreme Court of California to review the judgment entered by the Court of Appeal in this case. Therefore, the decision of the Court of Appeal is not a "[f]inal judgment . . . rendered by the highest court of a State in which a decision could be had . . . ." 28 U. S. C. § 1257, and we lack jurisdiction to review it. The writ of certiorari is dismissed for want of jurisdiction.

It is so ordered.

BISENIUS *v.* KARNS, COMMISSIONER OF MOTOR VEHICLES.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 1357. Decided June 16, 1969.

42 Wis. 2d 42, 165 N. W. 2d 377, appeal dismissed.

S. A. Schapiro for appellant.

Robert W. Warren, Attorney General of Wisconsin, and *Albert Harriman* and *Robert D. Martinson*, Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

STANBRIDGE *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 208, Misc. Decided June 16, 1969.

Certiorari granted; 21 N. Y. 2d 706, 794; 234 N. E. 2d 698, 235 N. E. 2d 456, vacated and remanded.

William Cahn for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123.

BALISTRIERI *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 1070. Decided June 16, 1969.

Rehearing granted; 394 U. S. 985, vacated; certiorari granted; 403 F. 2d 472, vacated and remanded.

Edward Bennett Williams and *Harold Ungar* for petitioner.

Solicitor General Griswold for the United States.

PER CURIAM.

The petition for rehearing is granted and the order denying the petition for a writ of certiorari is vacated. The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Seventh Circuit is vacated. The case is remanded to the United States District Court for the Southern District of Illinois for further proceedings in light of *Alderman* v. *United States*, 394 U. S. 165, and *Giordano* v. *United States*, 394 U. S. 310.

MR. JUSTICE BLACK dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

NORTH CAROLINA ET AL. *v.* PEARCE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 413. Argued February 24, 1969.—Decided June 23, 1969.*

In each of these cases the respondent was convicted of a crime and sentenced to a prison term; the original conviction was set aside in a post-conviction proceeding for constitutional error several years later; and on retrial the respondent was again convicted and sentenced. In No. 413, the sentence, when added to the time respondent had served, amounted to a longer total sentence than that originally imposed; and in No. 418, respondent received a longer sentence, with no credit being given for the time already served. In neither case was any justification given for imposition of the longer sentence. Respondents sought habeas corpus relief in the District Courts, which in each instance held the longer sentence on retrial unconstitutional. The Courts of Appeals affirmed. *Held:*

1. The basic Fifth Amendment guarantee against double jeopardy, which is enforceable against the States by the Fourteenth Amendment, *Benton* v. *Maryland*, *post*, p. 784, is violated when punishment already exacted for an offense is not fully "credited" in imposing a new sentence for the same offense. Pp. 717–719.

2. There is no absolute constitutional bar to imposing a more severe sentence on reconviction. Pp. 719–723.

(a) The guarantee against double jeopardy does not restrict the length of sentence upon reconviction, the power to impose whatever sentence is legally authorized being a corollary of the well-established power to retry a defendant whose conviction has been set aside for an error in the previous proceeding. Pp. 719–721.

(b) Imposition of a more severe sentence upon retrial does not violate the Equal Protection Clause of the Fourteenth Amendment, since there is no invidious "classification" of those successfully seeking new trials. Pp. 722–723.

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*Together with No. 418, *Simpson, Warden* v. *Rice*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

3. Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial and that a defendant be freed of any apprehension of retaliatory motivation on the part of the sentencing judge. Accordingly, the reasons for imposition after retrial of a more severe sentence must affirmatively appear in the record and must be based on objective information concerning the defendant's identifiable conduct after the original sentencing proceeding. Pp. 723–726.

No. 413, 397 F. 2d 253, and No. 418, 396 F. 2d 499, affirmed.

Andrew A. Vanore, Jr., argued the cause for petitioners in No. 413. With him on the brief was *Thomas Wade Bruton*, Attorney General of North Carolina, joined in and adopted by the Attorneys General for their respective States as follows: *MacDonald Gallion* of Alabama, *David P. Buckson* of Delaware, *John B. Breckinridge* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *James S. Erwin* of Maine, *Joe T. Patterson* of Mississippi, *Forrest H. Anderson* of Montana, *Clarence A. H. Meyer* of Nebraska, *Arthur J. Sills* of New Jersey, *William C. Sennett* of Pennsylvania, *Herbert F. DeSimone* of Rhode Island, *Daniel R. McLeod* of South Carolina, *George F. McCanless* of Tennessee, *Crawford C. Martin* of Texas, *Bronson C. LaFollette* of Wisconsin, and *James E. Barrett* of Wyoming; and *Paul J. Abbate*, Attorney General, for the Territory of Guam. *Paul T. Gish, Jr.*, Assistant Attorney General of Alabama, argued the cause for petitioner in No. 418. With him on the brief was *MacDonald Gallion*, Attorney General.

Larry B. Sitton, by appointment of the Court, 393 U. S. 973, argued the cause and filed a brief for respondent in No. 413. *Thomas S. Lawson, Jr.*, argued the cause for respondent in No. 418. With him on the brief was *Oakley Melton, Jr.*, by appointment of the Court, 393 U. S. 1010.

Robert C. Londerholm, Attorney General, and *Edward G. Collister, Jr.*, Assistant Attorney General, filed a brief for the State of Kansas as *amicus curiae* in No. 413. *William W. Van Alstyne* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al. as *amici curiae* in both cases.

MR. JUSTICE STEWART delivered the opinion of the Court.

When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial? That is the question presented by these two cases.

In No. 413 the respondent Pearce was convicted in a North Carolina court upon a charge of assault with intent to commit rape. The trial judge sentenced him to prison for a term of 12 to 15 years. Several years later he initiated a state post-conviction proceeding which culminated in the reversal of his conviction by the Supreme Court of North Carolina, upon the ground that an involuntary confession had unconstitutionally been admitted in evidence against him, 266 N. C. 234, 145 S. E. 2d 918. He was retried, convicted, and sentenced by the trial judge to an eight-year prison term, which, when added to the time Pearce had already spent in prison, the parties agree amounted to a longer total sentence than that originally imposed.[1] The conviction and sentence were affirmed on appeal. 268 N. C. 707, 151 S. E. 2d 571. Pearce then began this habeas corpus proceeding in the United States District Court for the Eastern Dis-

[1] The approximate expiration date of the original sentence, assuming all allowances of time for good behavior, was November 13, 1969. The approximate expiration date of the new sentence, assuming all allowances of time for good behavior, was October 10, 1972.

trict of North Carolina. That court held, upon the authority of a then very recent Fourth Circuit decision, *Patton* v. *North Carolina*, 381 F. 2d 636, cert. denied, 390 U. S. 905, that the longer sentence imposed upon retrial was "unconstitutional and void." [2] Upon the failure of the state court to resentence Pearce within 60 days, the federal court ordered his release. This order was affirmed by the United States Court of Appeals for the Fourth Circuit, 397 F. 2d 253, in a brief *per curiam* judgment citing its *Patton* decision, and we granted certiorari. 393 U. S. 922.

In No. 418 the respondent Rice pleaded guilty in an Alabama trial court to four separate charges of second-degree burglary. He was sentenced to prison terms aggregating 10 years.[3] Two and one-half years later the judgments were set aside in a state *coram nobis* proceeding, upon the ground that Rice had not been accorded his constitutional right to counsel. See *Gideon* v. *Wainwright*, 372 U. S. 335. He was retried upon three of the charges, convicted, and sentenced to prison terms aggregating 25 years.[4] No credit was given for the time he had spent in prison on the original judgments. He then brought this habeas corpus proceeding in the United States District Court for the Middle District of

[2] In *Patton*, the Court of Appeals for the Fourth Circuit had held that "increasing Patton's punishment after the reversal of his initial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense." 381 F. 2d, at 646.

[3] He was sentenced to four years in prison upon the first count, and two years upon each of the other three counts, the sentences to be served consecutively.

[4] He was sentenced to a prison term of 10 years on the first count, 10 years on the second count, and five years on the fourth count, the sentences to be served consecutively. The third count was dropped upon motion of the prosecution, apparently because the chief witness for the prosecution had left the State.

Alabama, alleging that the state trial court had acted unconstitutionally in failing to give him credit for the time he had already served in prison, and in imposing grossly harsher sentences upon retrial. United States District Judge Frank M. Johnson, Jr., agreed with both contentions. While stating that he did "not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it," Judge Johnson found that Rice had been denied due process of law, because "[u]nder the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional." 274 F. Supp. 116, 121, 122. The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, "on the basis of Judge Johnson's opinion," 396 F. 2d 499, 500, and we granted certiorari. 393 U. S. 932.

The problem before us[5] involves two related but analytically separate issues. One concerns the constitutional

[5] The United States Courts of Appeals have reached conflicting results in dealing with the basic problem here presented. In addition to the Fourth and Fifth Circuit decisions here under review, see *Marano* v. *United States*, 374 F. 2d 583 (C. A. 1st Cir.); *United States* v. *Coke*, 404 F. 2d 836 (C. A. 2d Cir.); *Starner* v. *Russell*, 378 F. 2d 808 (C. A. 3d Cir.); *United States* v. *White*, 382 F. 2d 445 (C. A. 7th Cir.); *Walsh* v. *United States*, 374 F. 2d 421 (C. A. 9th Cir.); *Newman* v. *Rodriguez*, 375 F. 2d 712 (C. A. 10th Cir.). The state courts have also been far from unanimous. Although most of the States seem either not to have considered the problem, or to have imposed only the generally applicable statutory limits upon sentences after retrial, a few States have prohibited more severe sentences upon retrial than were imposed at the original trial. See *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677; *People* v. *Ali*, 66 Cal. 2d 277, 424 P. 2d 932; *State* v. *Turner*, 247 Ore. 301, 429 P. 2d 565; *State* v. *Wolf*, 46 N. J. 301, 216 A. 2d 586; *State* v. *Leonard*, 39 Wis. 2d 461, 159 N. W. 2d 577.

limitations upon the imposition of a more severe punishment after conviction for the same offense upon retrial. The other is the more limited question whether, in computing the new sentence, the Constitution requires that credit must be given for that part of the original sentence already served. The second question is not presented in *Pearce*, for in North Carolina it appears to be the law that a defendant must be given full credit for all time served under the previous sentence. *State* v. *Stafford*, 274 N. C. 519, 164 S. E. 2d 371; *State* v. *Paige*, 272 N. C. 417, 158 S. E. 2d 522; *State* v. *Weaver*, 264 N. C. 681, 142 S. E. 2d 633. In any event, Pearce was given such credit.[6] Alabama law, however, seems to reflect a different view. *Aaron* v. *State*, 43 Ala. App. 450, 192 So. 2d 456; *Ex parte Merkes*, 43 Ala. App. 640, 198 So. 2d 789.[7] And respondent Rice, upon being resentenced, was given no credit at all for the two and one-half years he had already spent in prison.

We turn first to the more limited aspect of the question before us—whether the Constitution requires that, in computing the sentence imposed after conviction upon

[6] "THE COURT: It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined to the State's Prison for a period of eight years."

[7] A recent opinion of the Supreme Court of Alabama indicates that state law does require credit for time served under the original sentence at least to the extent that the total period of imprisonment would otherwise exceed the absolute statutory maximum that could be imposed for the offense in question. "Without such credit defendant would be serving time beyond the maximum fixed by law for the offense . . . charged in the indictment." *Goolsby* v. *State*, 283 Ala. 269, 215 So. 2d 602.

retrial, credit must be given for time served under the original sentence. We then consider the broader question of what constitutional limitations there may be upon the imposition of a more severe sentence after reconviction.

I.

The Court has held today, in *Benton* v. *Maryland*, *post*, p. 784, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections.[8] It protects against a second prosecution for the same offense after acquittal.[9] It protects against a second prosecution for the same offense after conviction.[10] And it protects against multiple punishments for the same offense.[11] This last protection is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte Lange*, 18 Wall. 163, 168:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party

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[8] See Note, Twice in Jeopardy, 75 Yale L. J. 262, 265–266 (1965).

[9] *United States* v. *Ball*, 163 U. S. 662; *Green* v. *United States*, 355 U. S. 184.

[10] *In re Nielsen*, 131 U. S. 176.

[11] *Ex parte Lange*, 18 Wall. 163; *United States* v. *Benz*, 282 U. S. 304, 307; *United States* v. *Sacco*, 367 F. 2d 368; *United States* v. *Adams*, 362 F. 2d 210; *Kennedy* v. *United States*, 330 F. 2d 26.

when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

. . . . . .

". . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Id.*, at 173.

We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully "credited" in imposing sentence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years' imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10-year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and 10 years, although the maximum single punishment for the offense is 10 years' imprisonment. Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.[12]

We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully

[12] We have spoken in terms of imprisonment, but the same rule would be equally applicable where a fine had been actually paid upon the first conviction. Any new fine imposed upon reconviction would have to be decreased by the amount previously paid.

"credited" [13] in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.

II.

To hold that the second sentence must be reduced by the time served under the first is, however, to give but a partial answer to the question before us.[14] We turn, therefore, to consideration of the broader problem of what constitutional limitations there may be upon the general power of a judge to impose upon reconviction a longer prison sentence than the defendant originally received.

A.

Long-established constitutional doctrine makes clear that, beyond the requirement already discussed, the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. At least since 1896, when *United States* v. *Ball*,

[13] Such credit must, of course, include the time credited during service of the first prison sentence for good behavior, etc.

[14] In most situations, even when time served under the original sentence is fully taken into account, a judge can still sentence a defendant to a longer term in prison than was originally imposed. That is true with respect to both cases before us. In the *Pearce* case, credit for time previously served was given. See n. 6, *supra*. In the *Rice* case credit for the two and one-half years served was not given, but even if it had been, the sentencing judge could have reached the same result that he did reach simply by sentencing Rice to 27½ years in prison. That would have been permissible under Alabama law, since Rice was convicted of three counts of second-degree burglary, and on each count a maximum sentence of 10 years' imprisonment could have been imposed. Ala. Code, Tit. 14, § 86 (1958).

163 U. S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.[15] "The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U. S. 463, 465. And at least since 1919, when *Stroud* v. *United States*, 251 U. S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.[16] "That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes, see *Robinson* v. *United States*, 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U. S. 282." *United States* v. *Tateo*, *supra*, at 466.

Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously

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[15] See, *e. g.*, *Stroud* v. *United States*, 251 U. S. 15; *Bryan* v. *United States*, 338 U. S. 552; *Forman* v. *United States*, 361 U. S. 416; *United States* v. *Tateo*, 377 U. S. 463.

[16] In *Stroud* the defendant was convicted of first-degree murder and sentenced to life imprisonment. After reversal of this conviction, the defendant was retried, reconvicted of the same offense, and sentenced to death. This Court upheld the conviction against the defendant's claim that his constitutional right not to be twice put in jeopardy had been violated. See also *Murphy* v. *Massachusetts*, 177 U. S. 155; *Robinson* v. *United States*, 324 U. S. 282, affirming 144 F. 2d 392. The Court's decision in *Green* v. *United States*, 355 U. S. 184, is of no applicability to the present problem. The *Green* decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted*.

verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. As to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction, as we have recognized in Part I of this opinion.[17] But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States* v. *Ball, supra,* and upon the unbroken line of decisions that have followed that principle for almost 75 years. We think those decisions are entirely sound, and we decline to depart from the concept they reflect.[18]

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[17] Cf. *King* v. *United States,* 69 App. D. C. 10, 12–13, 98 F. 2d 291, 293–294: "The Government's brief suggests, in the vein of The Mikado, that because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary;' that since he should not have been imprisoned as he was, he was not imprisoned at all."

[18] "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punish-

B.

The other argument advanced in support of the proposition that the Constitution absolutely forbids the imposition of a more severe sentence upon retrial is grounded upon the Equal Protection Clause of the Fourteenth Amendment. The theory advanced is that, since convicts who do not seek new trials cannot have their sentences increased, it creates an invidious classification to impose that risk only upon those who succeed in getting their original convictions set aside. The argument, while not lacking in ingenuity, cannot withstand close examination. In the first place, we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Putting that conceptual nicety to one side, however, the problem before us simply cannot be rationally dealt with in terms of "classifications." A man who is retried after his first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a State has invidiously "classified" those who successfully seek new trials, any more than that the State has invidiously "classified" those prisoners whose convictions are *not* set aside by denying the mem-

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ment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *United States* v. *Tateo*, 377 U. S. 463, 466.

bers of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.

C.

We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams* v. *New York,* 337 U. S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams* v. *New York, supra,* that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.,* at 247.

To say that there exists no absolute constitutional bar to the imposition of a more severe sentence upon retrial is not, however, to end the inquiry. There remains for consideration the impact of the Due Process Clause of the Fourteenth Amendment.

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his

having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." *United States* v. *Jackson*, 390 U. S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to "chill the exercise of basic constitutional rights." *Id.*, at 582. See also *Griffin* v. *California*, 380 U. S. 609; cf. *Johnson* v. *Avery*, 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.[19] "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant." *Nichols* v. *United States*, 106 F. 672, 679. A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." *Worcester* v. *Commissioner*, 370 F. 2d 713, 718. See *Short* v. *United States*, 120 U. S. App. D. C. 165, 167, 344 F. 2d 550, 552. "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S.

[19] See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

353; *Lane* v. *Brown*, 372 U. S. 477; *Draper* v. *Washington*, 372 U. S. 487." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310–311.

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.[20]

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[20] The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. But data have been collected to show that increased sentences on reconviction are far from rare. See Note, Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory, 1965 Duke L. J. 395. A touching bit of evidence showing the fear of such a vindictive policy was noted by the trial judge in *Patton* v. *North Carolina*, 256 F. Supp. 225, who quoted a letter he had recently received from a prisoner:

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. ———— chose to re-try me as I knew he would.

. . . . . .

"Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trile I am afraid of more time . . . .

"Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state re-try me if there is any way you can prevent it."

"Very truly yours"

Id., at 231, n. 7.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

We dispose of the two cases before us in the light of these conclusions. In No. 418 Judge Johnson noted that "the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences . . . ." 274 F. Supp., at 121. He found it "shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold." *Id.*, at 121–122. And he found that "the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review . . . ." *Id.*, at 122. In No. 413 the situation is not so dramatically clear. Nonetheless, the fact remains that neither at the time the increased sentence was imposed upon Pearce, nor at any stage in this habeas corpus proceeding, has the State offered any reason or justification for that sentence beyond the naked power to impose it. We conclude that in each of the cases before us, the judgment should be affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE MARSHALL joins, concurring.

Although I agree with the Court as to the reach of due process, I would go further. It is my view that if for any reason a new trial is granted and there is a convic-

tion a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy.

The theory of double jeopardy is that a person need run the gantlet only once. The gantlet is the risk of the range of punishment which the State or Federal Government imposes for that particular conduct. It may be a year to 25 years, or 20 years to life, or death. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. And the fact that he takes an appeal does not waive his constitutional defense of former jeopardy to a second prosecution. *Green* v. *United States*, 355 U. S. 184, 191–193.

In the *Green* case, the defendant was charged with arson on one count and on a second count was charged with either first-degree murder carrying a mandatory death sentence, or second-degree murder carrying a maximum sentence of life imprisonment. The jury found him guilty of arson and second-degree murder but the verdict was silent as to first-degree murder. He appealed the conviction and obtained a reversal. On a remand he was tried again. This time he was convicted of first-degree murder and sentenced to death—hence his complaint of former jeopardy. We held that the guarantee of double jeopardy applied and that the defendant, having been "in direct peril of being convicted and punished for first degree murder at his first trial" could not be "forced to run the gantlet" twice. 355 U. S., at 190.

It is argued that that case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. "It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or

allows the court or jury to fix different punishments for the same crime." *People* v. *Henderson*, 60 Cal. 2d 482, 497, 386 P. 2d 677, 686 (1963) (Traynor, J.).

From the point of view of the individual and his liberty, the risk here of getting from one to 15 years for specified conduct is different only in degree from the risk in *Green* of getting life imprisonment or capital punishment for specified conduct. Indeed, that matter was well understood by the dissenters in *Green:*

> "As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment." 355 U. S., at 213 (Frankfurter, J., dissenting).[1]

The defendants in the present cases at the first trial faced the risk of maximum punishment and received less. In the second trial they were made to run the gantlet twice, since the Court today holds that the penalties can be increased.

It was established at an early date that the Fifth Amendment was designed to prevent an accused from

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[1] "With the benefit of *Green* v. *United States* . . . there is support emerging in favor of a broad double jeopardy rule which would protect all federal and state convicts held in prison under erroneous convictions or sentences from harsher resentencing following retrial. . . . [T]he technical argument applying that rule would be as follows: When a particular penalty is selected from a range of penalties prescribed for a given offense, and when that penalty is imposed upon the defendant, the judge or jury is impliedly 'acquitting' the defendant of a greater penalty, just as the jury in *Green* impliedly acquitted . . . the accused of a greater degree of the same offense." Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 634–635 (1965).

running the risk of "double punishment." *United States* v. *Ewell*, 383 U. S. 116, 124. When Madison introduced to the First Congress his draft of what became the Double Jeopardy Clause, it read:

> "No person shall be subject, except in cases of impeachment, to *more than one punishment* or one trial for the same offence . . . ." (Emphasis supplied.) 1 Annals of Cong. 434.

The phrasing of that proposal was changed at the behest of those who feared that the reference to but "one trial" might prevent a convicted man from obtaining a new trial on writ of error. *Id.*, at 753. But that change was not intended to alter the ban against double punishment. Sigler, A History of Double Jeopardy, 7 Am. J. Legal Hist. 283, 304–306 (1963).

> "By forbidding that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' [the safeguard of the Fifth Amendment against double punishment] guarded against the repetition of history by . . . punishing [a man] for an offense when he had already suffered the punishment for it." *Roberts* v. *United States*, 320 U. S. 264, 276 (Frankfurter, J., dissenting).[2]

The inquiry, then, is into the meaning of "double" or "multiple" punishment. In *Ex parte Lange*, 18 Wall. 163, the petitioner had been sentenced to one-year imprisonment *and* $200 in fines, under a federal statute providing for a maximum penalty of one-year imprisonment *or* $200 in fines. On writ of habeas corpus five days later, the trial court re-examined its own prior sentence and reset it, instead, at one-year imprisonment

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[2] "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense." *Francis* v. *Resweber*, 329 U. S. 459, 462 (opinion by Reed, J.). See also *Williams* v. *Oklahoma*, 358 U. S. 576, 584–586.

without credit for time already served. This Court, on certiorari, ordered petitioner discharged altogether. It reasoned that the trial court had power to impose a sentence of either imprisonment or fine. Because the petitioner had paid the fine, he had already suffered complete punishment for his crime and could not be subjected to further sanction:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence." *Id.*, at 168.

Ex parte Lange left it somewhat in doubt, whether the ban on double punishment applied only to situations in which the second sentence was added to one that had been completely served; or whether it also applied to the case where the second sentence was added to one still being served. It was not until *United States* v. *Benz*, 282 U. S. 304, that the Court clarified its position. In that case, having initially set the defendant's sentence at 10 months, the trial court later reduced the sentence to six months. The Government appealed, and the question was certified to this Court, whether a reduction in sentence violated the Double Jeopardy Clause:

> "The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. . . . The rule is not confined to civil cases, but applies in criminal

cases as well, *provided the punishment be not augmented. Ex parte Lange,* 18 Wall. 163, 167–174 [additional citations omitted]. In the present case the power of the court was exercised to mitigate the punishment, not to increase it, and is thus brought within the limitation. . . .

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution . . . . This is the basis of the decision in *Ex parte Lange, supra.*" (Emphasis supplied.) 282 U. S., at 306–307.

The governing principle has thus developed that a convicted man may be retried after a successful appeal, *Bryan* v. *United States,* 338 U. S. 552; that he may run the risk, on retrial, of receiving a sentence as severe as that previously imposed, *United States* v. *Ball,* 163 U. S. 662; and that he may run the risk of being tried for a separate offense, *Williams* v. *Oklahoma,* 358 U. S. 576. But with all deference I submit that the State does not, because of prior error, have a second chance to obtain an enlarged sentence.[3] Where a man successfully attacks

[3] "I read the Double Jeopardy Clause as applying a strict standard. . . . It is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society. Once a trial starts jeopardy attaches. The prosecution must stand or fall on its performance at the trial. . . . The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government." *Gori* v. *United*

a sentence that he has already "fully served" (*Street* v. *New York*, 394 U. S. 576), the State cannot create an additional sentence and send him back to prison. *Ex parte Lange*, *supra*. Similarly, where a defendant successfully attacks a sentence that he has begun to serve, the State cannot impose an added sentence by sending him to prison for a greater term.[4]

States, 367 U. S. 364, 372–373 (DOUGLAS, J., dissenting). This Court has never held anything to the contrary. While *Stroud* v. *United States*, 251 U. S. 15, involved a defendant who received the death penalty upon retrial after successfully appealing a sentence of life imprisonment,

"it appears that the case was argued . . . on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder. There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution." *Patton* v. *North Carolina*, 381 F. 2d 636, 644–645 (C. A. 4th Cir. 1967).

To the extent that *Stroud* stands for anything to the contrary, it has been vitiated by *Green* v. *United States*, *supra*. *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963). Other cases involving the matter of increased sentencing upon retrial have either been ones in which the matter was not before the court because the parties did not raise it, *Robinson* v. *United States*, 144 F. 2d 392 (C. A. 6th Cir. 1944), aff'd, 324 U. S. 282, or because it was not necessary to a decision, *Fay* v. *Noia*, 372 U. S. 391, 440; or state cases in which this Court applied a loose standard of due process in lieu of the uncompromising dictates of the Double Jeopardy Clause, *Palko* v. *Connecticut*, 302 U. S. 319; *Francis* v. *Resweber*, 329 U. S. 459.

[4] Among the federal courts, some agree that increased sentencing upon retrial constitutes double jeopardy, *Patton* v. *North Carolina*, 381 F. 2d 636 (C. A. 4th Cir. 1967); *United States* v. *Adams*, 362 F. 2d 210 (C. A. 6th Cir. 1966). Other courts of appeals have found it unnecessary to resolve the matter but have indicated that,

The ban on double jeopardy has its roots deep in the history of occidental jurisprudence. "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus* v. *Illinois*, 359 U. S. 121, 151–155 (BLACK, J., dissenting). And its purposes are several. It prevents the State from using its criminal processes as an instrument of harassment to wear the accused out

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properly presented, they too would prohibit increased sentencing as a violation of the ban against double jeopardy. Compare *Walsh* v. *United States*, 374 F. 2d 421 (C. A. 9th Cir. 1967), with *Jack* v. *United States*, 387 F. 2d 471 (C. A. 9th Cir. 1967); *Castle* v. *United States*, 399 F. 2d 642 (C. A. 5th Cir. 1968). Still other circuits have found the Double Jeopardy Clause unavailing and would permit increased sentencing whenever justified by newly revealed evidence, *Marano* v. *United States*, 374 F. 2d 583 (C. A. 1st Cir. 1967), and *United States* v. *Coke*, 404 F. 2d 836 (C. A. 2d Cir. 1968); whenever supported by standards of rational sentencing, absent an intent to penalize the defendant for seeking a new trial, *United States* v. *White*, 382 F. 2d 445 (C. A. 7th Cir. 1967); or whenever considered appropriate by the sentencing judge, *Short* v. *United States*, 120 U. S. App. D. C. 165, 344 F. 2d 550 (1965); *Starner* v. *Russell*, 378 F. 2d 808 (C. A. 3d Cir. 1967); and *Newman* v. *Rodriguez*, 375 F. 2d 712 (C. A. 10th Cir. 1967).

Among the States, the governing standards are similarly mixed. An increase in sentence where the defendant can show that it reflects an intent to punish him for seeking a new trial is one instance, *State* v. *White*, 262 N. C. 52, 136 S. E. 2d 205 (1964). Of the States that prohibit increased sentencing upon retrial, some rest on state standards of double jeopardy, *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963); some ground that result in the "chilling effect" that a contrary rule would have on the right "to correct an erroneously conducted initial trial." *State* v. *Wolf*, 46 N. J. 301, 216 A. 2d 586 (1966), and *State* v. *Turner*, 247 Ore. 301, 313, 429 P. 2d 565, 570 (1967). Still others have reached that result either "as a matter of judicial policy," *State* v. *Holmes*, 281 Minn. 294, 296, 161 N. W. 2d 650, 652 (1968), or because of a state statute, *Rush* v. *State*, 239 Ark. 878, 395 S. W. 2d 3 (1965).

Some States, evidently for reasons other than double jeopardy, prohibit increased sentencing except where affirmatively justified

by a multitude of cases with accumulated trials. *Abbate* v. *United States*, 359 U. S. 187, 198–199 (opinion by BRENNAN, J.).

It serves the additional purpose of precluding the State, following *acquittal*, from successively retrying the defendant in the hope of securing a conviction. "The vice

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by newly developed evidence, *People* v. *Mulier*, 12 Mich. App. 28, 162 N. W. 2d 292; *People* v. *Thiel*, 29 App. Div. 2d 913, 289 N. Y. S. 2d 879; and *State* v. *Leonard*, 39 Wis. 2d 461, 159 N. W. 2d 577 (1968).

Although unwilling to place a ceiling over the sentencing at retrial, some States do allow credit for time already served, *Tilghman* v. *Culver*, 99 So. 2d 282 (Fla. 1957) (based on double jeopardy); *Moore* v. *Parole Board*, 379 Mich. 624, 154 N. W. 2d 437 (1967) (based on a local statute); *State* v. *Boles*, 151 W. Va. 1033, 159 S. E. 2d 36 (1967) (based on due process and equal protection); *Gray* v. *Hocker*, 268 F. Supp. 1004 (D. C. Nev. 1967) (based on equal protection); *Hill* v. *Holman*, 255 F. Supp. 924 (D. C. M. D. Ala. 1966) (based on due process). In the federal regime, the matter of credit is governed by statute, 18 U. S. C. § 3568.

Most States do permit increased sentencing on retrial without limit, *Ex parte Barnes*, 44 Ala. App. 329, 208 So. 2d 238 (1968); *Kohlfuss* v. *Warden of Connecticut State Prison*, 149 Conn. 692, 183 A. 2d 626 (1962); *Bohannon* v. *District of Columbia*, 99 A. 2d 647 (D. C. Mun. Ct. App. 1953); *Salisbury* v. *Grimes*, 223 Ga. 776, 158 S. E. 2d 412 (1967); *State* v. *Kneeskern*, 203 Iowa 929, 210 N. W. 465 (1926); *State* v. *Morgan*, 145 La. 585, 82 So. 711 (1919); *State* v. *Young*, 200 Kan. 20, 434 P. 2d 820 (1967); *Hobbs* v. *State*, 231 Md. 533, 191 A. 2d 238 (1963); *Moon* v. *State*, 250 Md. 468, 243 A. 2d 564 (1968); *Hicks* v. *Commonwealth*, 345 Mass. 89, 185 N. E. 2d 739 (1962); *Sanders* v. *State*, 239 Miss. 874, 125 So. 2d 923 (1961); *Commonwealth ex rel. Wallace* v. *Burke*, 169 Pa. Super. 633, 84 A. 2d 254 (1951); *State* v. *Squires*, 248 S. C. 239, 149 S. E. 2d 601 (1966).

Some States go so far as to deny credit against the new sentence for time already served in prison under the former one. *People* v. *Starks*, 395 Ill. 567, 71 N. E. 2d 23 (1947); *McDowell* v. *State*, 225 Ind. 495, 76 N. E. 2d 249 (1947); *State* v. *King*, 180 Neb. 631, 144 N. W. 2d 438 (1966); *Morgan* v. *Cox*, 75 N. M. 472, 406 P. 2d 347 (1965); *State* v. *Meadows*, 216 Tenn. 678, 393 S. W. 2d 744 (1965).

of this procedure lies in relitigating the same issue on the same evidence before two different juries with a man's innocence or guilt at stake" "in the hope that they would come to a different conclusion." *Hoag* v. *New Jersey*, 356 U. S. 464, 474, 475 (WARREN, C. J., dissenting). "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum* v. *United States*, 372 U. S. 734, 736.

And finally, it prevents the State, following *conviction*, from retrying the defendant again in the hope of securing a greater penalty.

> "This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict." *Ciucci* v. *Illinois*, 356 U. S. 571, 573 (DOUGLAS, J., dissenting).

It is the latter purpose which is relevant here, for in these cases the Court allows the State a second chance to retry the defendant in the hope of securing a more favorable penalty.

> "Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punish-

ment a second time, is the constitutional restriction of any value? . . .

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Ex parte Lange, supra,* at 173.

The Fourteenth Amendment would now prohibit North Carolina and Alabama, after trial, from retrying or resentencing these defendants in the bald hope of securing a more favorable [5] verdict. *Benton* v. *Maryland, post,* p. 784. But here, because these defendants were successful in appealing their convictions, the Court allows those States to do just that. It is said that events subsequent to the first trial [6] may justify a new and greater sentence. Of course that is true. But it is true, too, in *every* criminal case. Does that mean that the State should be allowed to reopen every verdict and readjust every sentence by coming forward with new evidence concerning guilt and punishment? If not, then why should it be allowed to do so merely because the defendant has taken the initiative in seeking an error-free trial? It is doubtless true that the State has an interest in adjusting sentences up-

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[5] "In *Swaim* v. *United States,* 165 U. S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional." *Reid* v. *Covert,* 354 U. S. 1, 37–38, n. 68 (opinion of BLACK, J.).

[6] To rely on information that has developed after the initial trial gives the Government "continuing criminal jurisdiction" to supplement its case against the defendant, far beyond the cut-off date set by its original prosecution. Consider the defendant whose sentence on retrial is enlarged because of antisocial acts committed in prison. To increase his sentence on that original offense because of wholly subsequent conduct is indirectly to hold him criminally responsible for that conduct.

ward when it discovers new evidence warranting that result. But the individual has an interest in remaining free of double punishment. And in weighing those interests against one another, the Constitution has decided the matter in favor of the individual. See *United States* v. *Tateo*, 377 U. S. 463, 475 (Goldberg, J., dissenting).

MR. JUSTICE BLACK, concurring in part and dissenting in part.

Respondent Pearce was convicted in a North Carolina court of assault with intent to rape and sentenced to serve 12 to 15 years in prison; respondent Rice pleaded guilty to four charges of burglary and was sentenced in an Alabama court to serve a total of 10 years. After having served several years, Pearce was granted a new trial because a confession used against him was held to have been obtained in violation of his constitutional right not to be compelled to be a witness against himself; Rice's conviction was set aside because, although he was indigent, he had not been provided with a court-appointed lawyer at the time he made his guilty plea. Both respondents were retried and again convicted.[1] Rice's sentence was increased to 25 years, and no credit was given for time he had previously served; Pearce was in effect given a sentence of 15 years, but since credit was allowed for the time he had already served, his new sentence was set at eight years.

I agree with the Court that the Double Jeopardy Clause prohibits the denial of credit for time already served. I also agree with the Court's rejection of respondents' claims that the increased sentences violate the Double Jeopardy and Equal Protection Clauses of the Constitution. It has been settled, as the Court cor-

[1] At Rice's second trial one of the four charges originally pressed against him was dropped, and he was tried only on the remaining three.

rectly notes, that the double jeopardy provision does not limit the length of the sentence imposed upon reconviction. Nor is there any invidious discrimination in subjecting defendants who have had prior convictions set aside to the same punishment faced by people who have never been tried at all. Those who have had former convictions set aside must, like all others who have been convicted, be sentenced according to law, and a trial judge will normally conduct a full inquiry into the background, disposition, and prospects for rehabilitation of each defendant in order to set the appropriate sentence. Accordingly, these defendants are not denied equal protection when the State makes no provision for re-evaluation of sentences generally but permits the penalty set after retrials to be whatever penalty the trial judge finds to be appropriate, whether it be higher or lower than the sentence originally set.

The Court goes on, however, to hold that it would be a flagrant violation of due process for a "state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *Ante*, at 723–724. This means, I take it, that a State cannot permit appeals in criminal cases and at the same time make it a crime for a convicted defendant to take or win an appeal. That would plainly deny due process of law, but not, as the Court's opinion implies, because the Court believes it to be an "unfair" practice. In the first place, the very enactment of two statutes side by side, one encouraging and granting appeals and another making it a crime to win an appeal, would be contrary to the very idea of government by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow, and would thus violate one of

the first principles of due process. Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property as a result. For these two reasons, I agree that a state law imposing punishment on a defendant for taking a permissible appeal in a criminal case would violate the Due Process Clause, but not because of any supposed "unfairness." Since such a law could take effect not only by state legislative enactment but also by state judicial decision, I also agree that it would violate the Constitution for any judge to impose a higher penalty on a defendant solely because he had taken a legally permissible appeal.

On this basis there is a plausible argument for upholding the judgment in No. 418 setting aside the second sentence of respondent Rice, since the District Judge there found it "shocking" to him that the State offered no evidence to show why it had so greatly increased Rice's punishment—namely, from a 10-year sentence on four burglary charges at the first trial to a 25-year sentence on three burglary charges at the second trial. From these circumstances, the Federal District Judge appeared to find as a fact that the sentencing judge had increased Rice's sentence for the specific purpose of punishing Rice for invoking the lawfully granted post-conviction remedies. Since at this distance we should ordinarily give this finding the benefit of every doubt, I would accept the Federal District Judge's conclusion that the State in this case attempted to punish Rice for lawfully challenging his conviction and would therefore, with some reluctance, affirm the decision of the Court of Appeals in that case. But this provides no

basis for affirming the judgment of the Court of Appeals in No. 413, the case involving respondent Pearce. For in that case there is not a line of evidence to support the slightest inference that the trial judge wanted or intended to punish Pearce for seeking post-conviction relief. Indeed the record shows that this trial judge meticulously computed the time Pearce had served in jail in order to give him full credit for that time.[2]

The Court justifies affirming the release of Pearce in this language:

> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Ante,* at 726.

Of course nothing in the Due Process Clause grants this Court any such power as it is using here. Punishment based on the impermissible motivation described by the Court is, as I have said, clearly unconstitutional, and

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[2] At the time of sentencing after Pearce's second trial, the judge stated:

"It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined to the State's Prison for a period of eight years."

courts must of course set aside the punishment if they find, by the normal judicial process of fact-finding, that such a motivation exists. But, beyond this, the courts are not vested with any general power to prescribe particular devices "[i]n order to assure the absence of such a motivation." Numerous different mechanisms could be thought of, any one of which would serve this function. Yet the Court does not explain why the particular detailed procedure spelled out in this case is *constitutionally* required, while other remedial devices are not. This is pure legislation if there ever was legislation.

I have no doubt about the power of Congress to enact such legislation under § 5 of the Fourteenth Amendment, which reads:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

But should Congress enact what the Court has here enacted, a requirement that state courts articulate their reasons for imposing particular sentences, it would still be legislation only, and Congress could repeal it. In fact, since this is only a rule supplementing the Fourteenth Amendment, the Court itself might be willing to accept congressional substitutes for this supposedly "constitutional" rule which this Court today enacts. So despite the fact that the Court says that the judge's reasons "must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal," I remain unconvinced that this Court can legitimately add any additional commands to the Fourteenth or any other Amendment.

Apart from this, the possibility that judicial action will be prompted by impermissible motives is a particularly poor reason for holding that detailed rules of procedure are constitutionally binding in every state and federal

prosecution. The danger of improper motivation is of course ever present. A judge *might* impose a specially severe penalty solely because of a defendant's race, religion, or political views. He *might* impose a specially severe penalty because a defendant exercised his right to counsel, or insisted on a trial by jury, or even because the defendant refused to admit his guilt and insisted on any particular kind of trial. In all these instances any additional punishment would of course be, for the reasons I have stated, flagrantly unconstitutional. But it has never previously been suggested by this Court that "[i]n order to assure the absence of such a motivation," this Court could, as a matter of constitutional law, direct all trial judges to spell out in detail their reasons for setting a particular sentence, making their reasons "affirmatively appear," and basing these reasons on "objective information concerning identifiable conduct." Nor has this Court ever previously suggested in connection with sentencing that "the factual data . . . must be made part of the record." On the contrary, we spelled out in some detail in *Williams* v. *New York*, 337 U. S. 241 (1949), our reasons for refusing to subject the sentencing process to any such limitations, which might hamstring modern penological reforms, and the Court has, until today, continued to reaffirm that decision. See, *e. g.*, *Specht* v. *Patterson*, 386 U. S. 605 (1967). There are many perfectly legitimate reasons that a judge might have for imposing a higher sentence. For instance, take the case of respondent Rice. Without a lawyer, he pleaded guilty to four charges of burglary and received a sentence of only 10 years. Although not shown by the record, what happened is not difficult to see. It is common knowledge that prosecutors frequently trade with defendants and agree to recommend low sentences in return for pleas of guilty. Judges frequently accept such agreements without carefully scru-

tinizing the record of the defendant. One needs little imagination to infer that Rice's original sentence was the result of precisely such a practice. This explains both the first 10-year sentence and the fact that, after a full trial and examination of the entire record, the trial judge concluded that a 25-year sentence was called for. The Court's opinion today will—unfortunately, I think, for defendants—throw stumbling blocks in the way of their making similar beneficial agreements in the future. Moreover, the Court's opinion may hereafter cause judges to impose heavier sentences on defendants in order to preserve their lawfully authorized discretion should defendants win reversals of their original convictions.

I would firmly adhere to the *Williams* principle of leaving judges free to exercise their discretion in sentencing. I would accept the finding of fact made by the Federal District Judge in No. 418, that the higher sentence imposed on respondent Rice was motivated by constitutionally impermissible considerations. But I would not go further and promulgate detailed rules of procedure as a matter of constitutional law, and since there is no finding of actually improper motivation in No. 413, I would reverse the judgment of the Court of Appeals in that case and reinstate the second sentence imposed upon respondent Pearce.

One last thought. There are some who say that there is nothing but a semantic difference between my view—that the Due Process Clause guarantees only that persons must be tried pursuant to the Constitution and laws passed under it—and the opposing view—that the Constitution grants judges power to decide constitutionality on the basis of their own concepts of fairness, justice, or "the Anglo-American legal heritage." *Sniadach* v. *Family Finance Corp., ante,* at 343 (HARLAN, J., concurring). But in this case and elsewhere, as I see it, the difference between these views comes to nothing less than the dif-

ference between what the Constitution says and means and what the judges from day to day, generation to generation, and century to century, decide is fairest and best for the people. Deciding that an ambiguous or self-contradictory law violates due process is a far cry from holding that a law violates due process because it is "unfair" or "shocking" to a judge or violates "the Anglo-American legal heritage." A due process criminal trial means a trial in a court, with an independent judge lawfully selected, a jury, a defendant's lawyer if the defendant wants one, a court with power to issue compulsory process for witnesses, and with all the other guarantees provided by the Constitution and valid laws passed pursuant to it. See, *e. g., Chambers* v. *Florida,* 309 U. S. 227, 235–237, 240–241 (1940); *Toth* v. *Quarles,* 350 U. S. 11 (1955). That is the difference for me between our Constitution as *written* by the Founders and an unwritten constitution to be formulated by judges according to their ideas of fairness on a case-by-case basis. I therefore must dissent from affirmance of the judgment in the case of respondent Pearce.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

Were these cases to be judged entirely within the traditional confines of the Due Process Clause of the Fourteenth Amendment, I should, but not without some difficulty, find myself in substantial agreement with the result reached by the Court. However, the Court today, in *Benton* v. *Maryland, post,* p. 784, has held, over my dissent, that the Double Jeopardy Clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment Due Process Clause. While my usual practice is to adhere until the end of Term to views I have expressed in dissent during the Term, I believe I should not proceed in these important cases as if *Benton* had turned out otherwise.

Given *Benton*, it is my view that the decision of this Court in *Green* v. *United States*, 355 U. S. 184 (1957), from which I dissented at the time, points strongly to the conclusion, also reached by my Brother DOUGLAS, *ante*, p. 726, that the Double Jeopardy Clause of the Fifth Amendment governs *both* issues presently decided by the Court. Accordingly, I join in Part I of the Court's opinion, and concur in the result reached in Part II, except in one minor respect.[1]

Green v. *United States*, *supra*, held in effect that a defendant who is convicted of a lesser offense included in that charged in the original indictment, and who thereafter secures reversal, may be retried only for the lesser included offense. Mr. Justice Frankfurter observed, in a dissent which I joined, that:

> "As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly [increased] . . . punishment . . . ." *Id.*, at 213.

Further reflection a decade later has not changed my view that the two situations cannot be meaningfully distinguished.

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[1] An outright affirmance in No. 413 would carry the consequence of relieving the respondent Pearce from serving the remaining few months of his original state sentence. See the Court's opinion, *ante*, at 713–714 and n. 1. There is no basis, whether the result in this case is governed by due process or double jeopardy, for such an interference with the State's legitimate criminal processes. I would therefore vacate the judgment of the Court of Appeals for the Fourth Circuit in No. 413 and remand the case so that an order may be entered releasing Pearce at, but not before, the expiration of his first sentence. Cf. *Peyton* v. *Rowe*, 391 U. S. 54 (1968).

Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an "implicit acquittal" of the greater offense, *ibid.*, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of "badness" or gravity only, and therefore merited only a certain limited punishment. Most significantly, perhaps, in each case a contrary rule would place the defendant considering whether to appeal his conviction in the same "incredible dilemma" and confront him with the same "desperate" choice. *Id.*, at 193. His decision whether or not to appeal would be burdened by the consideration that success,[2] followed by retrial and conviction, might place him in a far worse position than if he remained silent and suffered what seemed to him an unjust punishment.[3] In terms of *Green*, that the imposition of a more severe sentence on retrial is a matter of pure *chance*, rather than the result of purposeful retaliation for having taken an appeal, renders the choice no less "desperate."

If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase

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[2] A prohibition against enhanced punishment on retrial does not, of course, tend in any manner to encourage frivolous appeals. A contrary rule does not discourage frivolous appeals, except insofar as it discourages *all* appeals.

[3] The would-be appellant's quandary is most clearly seen when the first trial and conviction for a capital offense result in a sentence of life imprisonment. Cf., *e. g.*, *Green* v. *United States*, *supra*.

in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend "sentences"—as distinguished from "offenses"—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one. See *United States* v. *Benz*, 282 U. S. 304, 306–307 (1931); *Ex parte Lange*, 18 Wall. 163, 168, 173 (1874).

The Court does not suggest otherwise,[4] but in its view, apparently, when the conviction itself and not merely the consequent sentence has been set aside, or when either has been set aside at the defendant's behest,[5] the "slate *has* been wiped clean," *ante*, at 721, and the Double Jeopardy Clause presents no bar to the imposi-

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[4] Indeed, the Court relies on these cases in Part I of its opinion to hold that a prisoner must be afforded credit for time served pursuant to a subsequently vacated sentence.

[5] Neither *Lange* nor *Benz* indicates that the principle prohibiting the imposition of an enhanced sentence on the same judgment of conviction depends on whether the original sentence is vacated on the prisoner's application, or is set aside *sua sponte* by the court. (It appears, though not clearly, that Lange's sentence was set aside at his behest.)

In *Murphy* v. *Massachusetts*, 177 U. S. 155 (1900), however, the Court indicated that one who successfully moves to vacate his sentence occupies "the same posture as if he had sued out his writ of error on the day he was first sentenced, and the mere fact that by reason of his delay in doing so he had served a portion of the erroneous sentence could not entitle him to assert that he was being twice punished." *Id.*, at 161–162. Thus, the Court concluded in *Murphy* not only that the sentence could be augmented, but also that the petitioner was not constitutionally entitled to any credit for time served under the first sentence.

This proves too much, as the Court today holds in Part I of its opinion. In my view, neither conclusion survives *Green*.

tion of a sentence greater than that originally imposed. In support of this proposition, the Court relies chiefly on two cases, *Stroud* v. *United States*, 251 U. S. 15 (1919), and *United States* v. *Ball*, 163 U. S. 662 (1896). I do not believe that either of these cases provides an adequate basis for the Court's seemingly incongruous conclusion.

Stroud v. *United States*, *supra*, held that a defendant who received a life sentence for first-degree murder could, upon securing a reversal of the conviction, be retried for first-degree murder and sentenced to death. However, the opinion does not explicitly advert to the question whether the Double Jeopardy Clause bars the imposition of an increased punishment, and an examination of the briefs in that case confirms the doubt expressed by the Court of Appeals in *Patton* v. *North Carolina*, 381 F. 2d 636, 644 (1967), whether this question was squarely presented to the Court.[6] Assuming that *Stroud* stood for the proposition which the majority attributes to it, that decision simply cannot be squared with the subsequent decision in *Green* v. *United States*, 355 U. S. 184 (1957). See *id.*, at 213 (dissenting opinion); *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963).

The Court does not rest solely on this ambiguous and doubtful precedent, however. Its main point seems to be that to limit the punishment on retrial to that imposed at the former trial "would be to cast doubt upon the whole validity of the basic principle enunciated in

[6] Stroud pitched his double jeopardy claim on the theory that, although "the constitutional prohibition does not prevent a second trial after reversal in *non-capital* cases," it does—without reference to the sentence imposed—preclude "a second trial upon reversal of a conviction in a *capital case*." Brief for Plaintiff in Error in No. 276, O. T. 1919, p. 32. Stroud's argument as to the enhanced sentence appears based solely on nonconstitutional grounds. See *id.*, at 89 *et seq.*

United States v. *Ball*," 163 U. S. 662 (1896), and its progeny. *Ante*, at 721.

Ball held, simply, that a defendant who succeeds in getting his first conviction set aside may thereafter be retried for the same offense of which he was formerly convicted. This is, indeed, a fundamental doctrine in our criminal jurisprudence, and I would be the last to undermine it. But *Ball* does not speak to the question of what *punishment* may be imposed on retrial. I entirely fail to understand the Court's suggestion, unless it assumes that *Ball* must stand or fall on the question-begging notion that, to quote the majority today, "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean."[7] *Ante*, at 721.

In relying on this conceptual fiction, the majority forgets that *Green* v. *United States*, *supra*, prohibits the imposition of an increased punishment on retrial precisely *because* convictions are usually set aside only at the defendant's behest, and not in spite of that fact. 355 U. S., at 193–194; *supra*, at 746: the defendant's choice to appeal an erroneous conviction is protected by the rule that he may not again be placed in jeopardy of suffering the greater punishment not imposed at the

[7] This fiction would seem to lead to a result which even the majority might have difficulty reconciling with the Double Jeopardy Clause's prohibition of multiple punishment. Consider the situation of a defendant who successfully vacates a conviction and is then retried and convicted after he has fully served the sentence first imposed. See *Street* v. *New York*, 394 U. S. 576 (1969); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Ginsberg* v. *New York*, 390 U. S. 629 (1968). Although the sentence was fully served, the defendant himself has caused the judgment to be vacated, and the majority's "nullification" principle would seem to allow the judge to impose a new sentence of imprisonment on him—so long as the new sentence was an "increased" sentence rather than the result of the court's failure to "credit" the defendant with the sentence he had completed.

first trial. Moreover, in its exaltation of form over substance and policy, the Court misconceives, I think, the essential principle of *Ball* itself:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964).

To be sure, this societal interest is compromised to a degree if the second judge is forbidden to impose a greater punishment on retrial than was meted out at the first trial. For example, new facts may develop between the first and second trial which would, as an initial matter, be considered in aggravation of sentence. By the same token, however, the prosecutor who was able to prove only second-degree murder at the former trial might improve his case in the interim and acquire sufficient evidence to prove murder in the first degree. In either instance, if one views the second trial in a vacuum, the defendant has received less punishment than is his due. But in both cases, the compromise is designed to protect other societal interests, and it is, after *Green*, a compromise compelled by the Double Jeopardy Clause.[8]

[8] That the new facts may consist of misdeeds committed by the defendant since the first trial, rather than prior misconduct only subsequently discovered, should not, in my view, alter the outcome

I therefore conclude that, consistent with the Fifth Amendment, a defendant who has once been convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed. Because the Double Jeopardy Clause has now been held applicable to the States, *Benton* v. *Maryland*, *supra*, I would affirm the judgment of the Court of Appeals in No. 418, and vacate and remand in No. 413, so that respondent Pearce may finish serving his first, valid sentence. See n. 1, *supra*.

MR. JUSTICE WHITE, concurring in part.

I join the Court's opinion except that in my view Part II–C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding.

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under *Green* and the other double jeopardy cases. If subsequent misdeeds amount to criminal violations, the defendant may properly be tried and punished for them. If they amount to something less, the very uncertainty as to what kinds of noncriminal conduct may be considered in aggravation of the sentence on retrial would, analytically, seem to thwart the concerns protected by *Green*. In either event, I do not understand what rational policy distinguishes a defendant whose appeal is successful from one who takes no appeal and whose sentence may not, consistent with the Double Jeopardy Clause, be augmented. See *supra*, at 747.

Of course, nothing in the Double Jeopardy Clause forbids a prosecutor from introducing new and harmful evidence at the second trial in order to improve his chances of obtaining a conviction for the lesser offense of which the defendant was previously convicted or to assure that the defendant receives the full punishment imposed at the first trial.

CHIMEL *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 770. Argued March 27, 1969.—
Decided June 23, 1969.

Police officers, armed with an arrest warrant but not a search warrant, were admitted to petitioner's home by his wife, where they awaited petitioner's arrival. When he entered he was served with the warrant. Although he denied the officers' request to "look around," they conducted a search of the entire house "on the basis of the lawful arrest." At petitioner's trial on burglary charges, items taken from his home were admitted over objection that they had been unconstitutionally seized. His conviction was affirmed by the California appellate courts, which held, despite their acceptance of petitioner's contention that the arrest warrant was invalid, that since the arresting officers had procured the warrant "in good faith," and since in any event they had had sufficient information to constitute probable cause for the arrest, the arrest was lawful. The courts also held that the search was justified as incident to a valid arrest. *Held:* Assuming the arrest was valid, the warrantless search of petitioner's house cannot be constitutionally justified as incident to that arrest. Pp. 755–768.

(a) An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may search the area "within the immediate control" of the person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence. Pp. 762–763.

(b) For the routine search of rooms other than that in which an arrest occurs, or for searching desk drawers or other closed or concealed areas in that room itself, absent well-recognized exceptions, a search warrant is required. P. 763.

(c) While the reasonableness of a search incident to arrest depends upon "the facts and circumstances—the total atmosphere of the case," those facts and circumstances must be viewed in the light of established Fourth Amendment principles, and the only reasoned distinction is one between (1) a search of the person arrested and the area within his reach, and (2) more extensive searches. Pp. 765–766.

(d) *United States* v. *Rabinowitz*, 339 U. S. 56, and *Harris* v. *United States*, 331 U. S. 145, on their facts, and insofar as the principles they stand for are inconsistent with this decision, are no longer to be followed. P. 768.

(e) The scope of the search here was unreasonable under the Fourth and Fourteenth Amendments, as it went beyond petitioner's person and the area from within which he might have obtained a weapon or something that could have been used as evidence against him, and there was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. P. 768.

68 Cal. 2d 436, 439 P. 2d 333, reversed.

Keith C. Monroe, by appointment of the Court, 394 U. S. 940, argued the cause and filed briefs for petitioner.

Ronald M. George, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch*, Attorney General, and *William E. James*, Assistant Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that

"on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.

Accompanied by the petitioner's wife, the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. In some rooms the search was relatively cursory. In the master bedroom and sewing room, however, the officers directed the petitioner's wife to open drawers and "to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary." After completing the search, they seized numerous items—primarily coins, but also several medals, tokens, and a few other objects. The entire search took between 45 minutes and an hour.

At the petitioner's subsequent state trial on two charges of burglary, the items taken from his house were admitted into evidence against him, over his objection that they had been unconstitutionally seized. He was convicted, and the judgments of conviction were affirmed by both the California Court of Appeal, 61 Cal. Rptr. 714, and the California Supreme Court, 68 Cal. 2d 436, 439 P. 2d 333. Both courts accepted the petitioner's contention that the arrest warrant was invalid because the supporting affidavit was set out in conclusory terms,[1] but held that since the arresting officers had procured the warrant "in good faith," and since in any event they had had sufficient information to constitute probable cause for the petitioner's arrest, that arrest had been lawful. From this conclusion the appellate courts went on to hold that the search of the petitioner's home

[1] The affidavit supporting the warrant is set out in the opinion of the Court of Appeal, 61 Cal. Rptr., at 715–716, n. 1, and the State does not challenge its insufficiency under the principles of *Aguilar* v. *Texas*, 378 U. S. 108, and *Spinelli* v. *United States*, 393 U. S. 410.

had been justified, despite the absence of a search warrant, on the ground that it had been incident to a valid arrest. We granted certiorari in order to consider the petitioner's substantial constitutional claims. 393 U. S. 958.

Without deciding the question, we proceed on the hypothesis that the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution. This brings us directly to the question whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to that arrest. The decisions of this Court bearing upon that question have been far from consistent, as even the most cursory review makes evident.

Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by the Court in 1914 as dictum in *Weeks* v. *United States*, 232 U. S. 383, in which the Court stated:

> "What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Id.*, at 392.

That statement made no reference to any right to search the *place* where an arrest occurs, but was limited to a right to search the "person." Eleven years later the case of *Carroll* v. *United States*, 267 U. S. 132, brought the following embellishment of the *Weeks* statement:

> "When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held

as evidence in the prosecution." *Id.*, at 158. (Emphasis added.)

Still, that assertion too was far from a claim that the "place" where one is arrested may be searched so long as the arrest is valid. Without explanation, however, the principle emerged in expanded form a few months later in *Agnello* v. *United States*, 269 U. S. 20—although still by way of dictum:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392." 269 U. S., at 30.

And in *Marron* v. *United States*, 275 U. S. 192, two years later, the dictum of *Agnello* appeared to be the foundation of the Court's decision. In that case federal agents had secured a search warrant authorizing the seizure of liquor and certain articles used in its manufacture. When they arrived at the premises to be searched, they saw "that the place was used for retailing and drinking intoxicating liquors." *Id.*, at 194. They proceeded to arrest the person in charge and to execute the warrant. In searching a closet for the items listed in the warrant they came across an incriminating ledger, concededly not covered by the warrant, which they also seized. The Court upheld the seizure of the ledger by holding that since the agents had made a lawful arrest, "[t]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." *Id.*, at 199.

That the *Marron* opinion did not mean all that it seemed to say became evident, however, a few years later in *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, and *United States* v. *Lefkowitz,* 285 U. S. 452. In each of those cases the opinion of the Court was written by Mr. Justice Butler, the author of the opinion in *Marron.* In *Go-Bart,* agents had searched the office of persons whom they had lawfully arrested,[2] and had taken several papers from a desk, a safe, and other parts of the office. The Court noted that no crime had been committed in the agents' presence, and that although the agent in charge "had an abundance of information and time to swear out a valid [search] warrant, he failed to do so." 282 U. S., at 358. In holding the search and seizure unlawful, the Court stated:

> "Plainly the case before us is essentially different from *Marron* v. *United States,* 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place." 282 U. S., at 358.

This limited characterization of *Marron* was reiterated in *Lefkowitz,* a case in which the Court held unlawful a search of desk drawers and a cabinet despite the fact that the search had accompanied a lawful arrest. 285 U. S., at 465.

The limiting views expressed in *Go-Bart* and *Lefkowitz* were thrown to the winds, however, in *Harris* v. *United*

[2] The Court assumed that the arrests were lawful. 282 U. S., at 356.

States, 331 U. S. 145, decided in 1947. In that case, officers had obtained a warrant for Harris' arrest on the basis of his alleged involvement with the cashing and interstate transportation of a forged check. He was arrested in the living room of his four-room apartment, and in an attempt to recover two canceled checks thought to have been used in effecting the forgery, the officers undertook a thorough search of the entire apartment. Inside a desk drawer they found a sealed envelope marked "George Harris, personal papers." The envelope, which was then torn open, was found to contain altered Selective Service documents, and those documents were used to secure Harris' conviction for violating the Selective Training and Service Act of 1940. The Court rejected Harris' Fourth Amendment claim, sustaining the search as "incident to arrest." *Id.*, at 151.

Only a year after *Harris*, however, the pendulum swung again. In *Trupiano* v. *United States*, 334 U. S. 699, agents raided the site of an illicit distillery, saw one of several conspirators operating the still, and arrested him, contemporaneously "seiz[ing] the illicit distillery." *Id.*, at 702. The Court held that the arrest and others made subsequently had been valid, but that the unexplained failure of the agents to procure a search warrant—in spite of the fact that they had had more than enough time before the raid to do so—rendered the search unlawful. The opinion stated:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . To provide the necessary security against unreasonable intrusions upon the private lives of

individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

. . . . . .

"A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest." *Id.*, at 705, 708.

In 1950, two years after *Trupiano*,[3] came *United States* v. *Rabinowitz*, 339 U. S. 56, the decision upon which California primarily relies in the case now before us. In *Rabinowitz*, federal authorities had been informed that the defendant was dealing in stamps bearing forged overprints. On the basis of that information they secured a warrant for his arrest, which they executed at his one-room business office. At the time of the arrest, the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half," *id.*, at 59, and seized 573 stamps with forged overprints. The stamps were admitted into evidence at the defendant's trial, and this Court affirmed his conviction, rejecting the contention that the warrantless search had been unlawful. The Court held that the search in its entirety fell within the principle giving law enforcement authorities "[t]he right 'to search the place where the arrest is made in order to find and seize things connected with the crime . . . .'" *Id.*, at 61. *Harris* was regarded as "ample authority" for that conclusion. *Id.*, at 63. The opinion rejected the rule of *Trupiano* that "in seizing goods and articles, law enforcement agents must secure and use search war-

[3] See also *McDonald* v. *United States*, 335 U. S. 451.

rants wherever reasonably practicable." The test, said the Court, "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.*, at 66.

Rabinowitz has come to stand for the proposition, *inter alia*, that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested.[4] And it was on the basis of that proposition that the California courts upheld the search of the petitioner's entire house in this case. That doctrine, however, at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.

Even limited to its own facts, the *Rabinowitz* decision was, as we have seen, hardly founded on an unimpeachable line of authority. As Mr. Justice Frankfurter commented in dissent in that case, the "hint" contained in *Weeks* was, without persuasive justification, "loosely turned into dictum and finally elevated to a decision." 339 U. S., at 75. And the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court.

Nor is the rationale by which the State seeks here to sustain the search of the petitioner's house supported by a reasoned view of the background and purpose of the Fourth Amendment. Mr. Justice Frankfurter wisely pointed out in his *Rabinowitz* dissent that the Amendment's proscription of "unreasonable searches and sei-

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[4] Decisions of this Court since *Rabinowitz* have applied the abstract doctrine of that case to various factual situations with divergent results. Compare *Ker* v. *California*, 374 U. S. 23, 42; *Abel* v. *United States*, 362 U. S. 217; and *Draper* v. *United States*, 358 U. S. 307, with *Kremen* v. *United States*, 353 U. S. 346 (*per curiam*). Cf. *Chapman* v. *United States*, 365 U. S. 610; *Jones* v. *United States*, 357 U. S. 493, 499–500.

zures" must be read in light of "the history that gave rise to the words"—a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution . . . ." 339 U. S., at 69. The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.[5] In the scheme of the Amendment, therefore, the requirement that "no Warrants shall issue, but upon probable cause," plays a crucial part. As the Court put it in *McDonald* v. *United States,* 335 U. S. 451:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id.,* at 455–456.

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[5] See generally *Boyd* v. *United States,* 116 U. S. 616, 624–625; *Weeks* v. *United States,* 232 U. S. 383, 389–391; *Davis* v. *United States,* 328 U. S. 582, 603–605 (dissenting opinion); *Harris* v. *United States,* 331 U. S. 145, 157–162 (dissenting opinion); *Stanford* v. *Texas,* 379 U. S. 476, 481–482.

Even in the *Agnello* case the Court relied upon the rule that "[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 269 U. S., at 33. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . ." *United States* v. *Jeffers*, 342 U. S. 48, 51.

Only last Term in *Terry* v. *Ohio*, 392 U. S. 1, we emphasized that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," *id.*, at 20,[6] and that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.*, at 19. The search undertaken by the officer in that "stop and frisk" case was sustained under that test, because it was no more than a "protective . . . search for weapons." *Id.*, at 29. But in a companion case, *Sibron* v. *New York*, 392 U. S. 40, we applied the same standard to another set of facts and reached a contrary result, holding that a policeman's action in thrusting his hand into a suspect's pocket had been neither motivated by nor limited to the objective of protection.[7] Rather, the search had been made in order to find narcotics, which were in fact found.

A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. When an

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[6] See also *Davis* v. *Mississippi*, 394 U. S. 721, 728; *Katz* v. *United States*, 389 U. S. 347, 356–358; *Warden* v. *Hayden*, 387 U. S. 294, 299; *Preston* v. *United States*, 376 U. S. 364, 367.

[7] Our *Sibron* opinion dealt with two cases. We refer here to No. 63, involving the appellant Sibron. See *infra*, at 764.

arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.[8] The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

This is the principle that underlay our decision in *Preston* v. *United States,* 376 U. S. 364. In that case three men had been arrested in a parked car, which had later been towed to a garage and searched by police. We held the search to have been unlawful under the Fourth Amendment, despite the contention that it had

[8] See *Katz* v. *United States,* 389 U. S. 347, 357–358.

been incidental to a valid arrest. Our reasoning was straightforward:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." *Id.*, at 367.[9]

The same basic principle was reflected in our opinion last Term in *Sibron*. That opinion dealt with *Peters* v. *New York*, No. 74, as well as with Sibron's case, and *Peters* involved a search that we upheld as incident to a proper arrest. We sustained the search, however, only because its scope had been "reasonably limited" by the "need to seize weapons" and "to prevent the destruction of evidence," to which *Preston* had referred. We emphasized that the arresting officer "did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons." 392 U. S., at 67.

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police

[9] Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States*, 267 U. S. 132, 153; see *Brinegar* v. *United States*, 338 U. S. 160.

conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest.[10] As Mr. Justice Frankfurter put it:

> "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response." *United States* v. *Rabinowitz*, 339 U. S., at 83 (dissenting opinion).

Thus, although "[t]he recurring questions of the reasonableness of searches" depend upon "the facts and circumstances—the total atmosphere of the case," *id.*, at 63, 66 (opinion of the Court), those facts and circumstances must be viewed in the light of established Fourth Amendment principles.

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[10] Some courts have carried the *Rabinowitz* approach to just such lengths. See, *e. g.*, *Clifton* v. *United States*, 224 F. 2d 329 (C. A. 4th Cir.), cert. denied, 350 U. S. 894 (purchaser of illicit whiskey arrested in back yard of seller; search of one room of house sustained); *United States* v. *Jackson*, 149 F. Supp. 937 (D. C. D. C.), rev'd on other grounds, 102 U. S. App. D. C. 109, 250 F. 2d 772 (suspect arrested half a block from his rented room; search of room upheld). But see *James* v. *Louisiana*, 382 U. S. 36 (*per curiam*).

It would be possible, of course, to draw a line between *Rabinowitz* and *Harris* on the one hand, and this case on the other. For *Rabinowitz* involved a single room, and *Harris* a four-room apartment, while in the case before us an entire house was searched. But such a distinction would be highly artificial. The rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.[11] The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.[12]

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[11] Cf. Mr. Justice Jackson's dissenting comment in *Harris:*

"The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court—and that means to me no limit at all." 331 U. S., at 197.

[12] It is argued in dissent that so long as there is probable cause to search the place where an arrest occurs, a search of that place should be permitted even though no search warrant has been obtained. This position seems to be based principally on two premises: first, that once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is "relatively minor"; and second, that the victim of the search may "shortly thereafter" obtain a judicial determination of whether the search was justified by probable cause. With respect to the second premise, one may initially question whether all of the States in fact provide the speedy suppression procedures the dissent assumes. More fundamentally, however, we cannot accept the view that Fourth Amendment interests are vindicated so long as "the rights of the criminal" are "protect[ed] . . . against introduction of evidence seized without probable cause." The Amendment is designed to prevent, not simply to redress, unlawful police action. In any event, we cannot join in characterizing the invasion

The petitioner correctly points out that one result of decisions such as *Rabinowitz* and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his assertion that such a strategy was utilized here,[13] but the fact remains that had he been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant. In any event, even apart from the possibility of such police tactics, the general point so forcefully made by Judge Learned Hand in *United States* v. *Kirschenblatt,* 16 F. 2d 202, remains:

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the prem-

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of privacy that results from a top-to-bottom search of a man's house as "minor." And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

[13] Although the warrant was issued at 10:39 a. m. and the arrest was not made until late in the afternoon, the State suggests that the delay is accounted for by normal police procedures and by the heavy workload of the officer in charge. In addition, that officer testified that he and his colleagues went to the petitioner's house "to keep from approaching him at his place of business to cause him any problem there."

ises; but it is small consolation to know that one's papers are safe only so long as one is not at home." *Id.*, at 203.

Rabinowitz and *Harris* have been the subject of critical commentary for many years,[14] and have been relied upon less and less in our own decisions.[15] It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.[16]

Reversed.

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[14] See, *e. g.*, J. Landynski, Search and Seizure and the Supreme Court 87–117 (1966); Way, Increasing Scope of Search Incidental to Arrest, 1959 Wash. U. L. Q. 261; Note, Scope Limitations for Searches Incident to Arrest, 78 Yale L. J. 433 (1969); Note, The Supreme Court 1966 Term, 81 Harv. L. Rev. 69, 117–122 (1967).

[15] Cf. *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216, 220; *Katz* v. *United States*, 389 U. S., at 357–358, n. 20; *Warden* v. *Hayden*, 387 U. S., at 299; *Stoner* v. *California*, 376 U. S. 483, 487. But see *Cooper* v. *California*, 386 U. S. 58, 62; *Ker* v. *California*, 374 U. S., at 42 (opinion of Clark, J.); cf. *Beck* v. *Ohio*, 379 U. S. 89, 91; *Abel* v. *United States*, 362 U. S., at 236–239; *Giordenello* v. *United States*, 357 U. S. 480, 488.

[16] The State has made various subsidiary contentions, including arguments that it would have been unduly burdensome to obtain a warrant specifying the coins to be seized and that introduction of the fruits of the search was harmless error. We reject those contentions as being without merit.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with these remarks concerning a factor to which the Court has not alluded.

The only thing that has given me pause in voting to overrule *Harris* and *Rabinowitz* is that as a result of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Ker* v. *California*, 374 U. S. 23 (1963), every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment.

Thus, one is now faced with the dilemma, envisioned in my separate opinion in *Ker*, 374 U. S., at 45–46, of choosing between vindicating sound Fourth Amendment principles at the possible expense of state concerns, long recognized to be consonant with the Fourteenth Amendment before *Mapp* and *Ker* came on the books, or diluting the Federal Bill of Rights in the interest of leaving the States at least some elbow room in their methods of criminal law enforcement. No comparable dilemma exists, of course, with respect to the impact of today's decision within the federal system itself.

This federal-state factor has not been an easy one for me to resolve, but in the last analysis I cannot in good conscience vote to perpetuate bad Fourth Amendment law.

I add only that this case, together with *Benton* v. *Maryland*, *post*, p. 784, *North Carolina* v. *Pearce*, *ante*, p. 711, and *Simpson* v. *Rice*, *ante*, p. 711, all decided

today, serve to point up, as few other cases have, the profound changes that the "incorporation doctrine" has wrought both in the workings of our federal system and upon the adjudicative processes of this Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search "incident to an arrest." There has been a remarkable instability in this whole area, which has seen at least four major shifts in emphasis. Today's opinion makes an untimely fifth. In my view, the Court should not now abandon the old rule.

I.

The modern odyssey of doctrine in this field is detailed in the majority opinion. It began with *Weeks* v. *United States*, 232 U. S. 383 (1914), where the Court paused to note what the case before it was not. "It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. . . . Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest *within the control of the accused.*" *Id.*, at 392. (Emphasis added.) This scope of search incident to arrest, extending to all items under the suspect's "control," was reaffirmed in a dictum in *Carroll* v. *United States*, 267 U. S. 132, 158 (1925). Accord, *Agnello* v. *United States*, 269 U. S. 20, 30 (1925) (holding that "the place where the arrest is made" may be searched "is not to be doubted"). The rule was reaffirmed in *Marron* v. *United States*, 275 U. S. 192, 199 (1927), where the Court asserted that authority

to search incident to an arrest "extended to all parts of the premises used for the unlawful purpose."

Within five years, this rule was qualified by two Prohibition Act cases, *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 356–358 (1931), and *United States* v. *Lefkowitz*, 285 U. S. 452, 463–467 (1932).

If *Go-Bart* and *Lefkowitz* represented a retreat from the rule of *Weeks*, *Carroll*, *Agnello*, and *Marron*, the vigor of the earlier rule was reaffirmed in *Harris* v. *United States*, 331 U. S. 145 (1947), which has, but for one brief interlude, clearly been the law until today. The very next Term after *Harris*, in *Trupiano* v. *United States*, 334 U. S. 699 (1948), the Court held unjustifiable the seizure of a still incident to the arrest of a man at the still site, even though the still was contraband, had been visible through an open door before entering the premises to be "searched," and although a crime was being committed in the officers' presence. Accord, that year, *McDonald* v. *United States*, 335 U. S. 451 (1948) (gambling game seen through transom before entry). Less than two years later, however, the Court returned to the *Harris* rule in *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), where the Court held that the reasonableness of a search does not depend upon the practicability of obtaining a search warrant, and that the fact of a valid arrest is relevant to reasonableness. *Trupiano* was *pro tanto* overruled.

Such rapid reversals have occurred before,[1] but they are rare. Here there had been two about-faces, one following hard upon the other. Justice Frankfurter objected in this language: "Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of

[1] *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), overruled *Jones* v. *Opelika*, 316 U. S. 584 (1942); *Legal Tender Cases*, 12 Wall. 457 (1871), overruled *Hepburn* v. *Griswold*, 8 Wall. 603 (1870).

chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." 339 U. S., at 86. Since that time, the rule of *Weeks*, *Marron*, *Harris*, and *Rabinowitz* has clearly been the law. *E. g.*, *Abel* v. *United States*, 362 U. S. 217 (1960) (Frankfurter, J., writing for the Court); *Ker* v. *California*, 374 U. S. 23 (1963).[2]

II.

The rule which has prevailed, but for very brief or doubtful periods of aberration, is that a search incident to an arrest may extend to those areas under the control of the defendant and where items subject to constitutional seizure may be found. The justification for this rule must, under the language of the Fourth Amendment, lie in the reasonableness of the rule. *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In terms, then, the Court must decide whether a given search is reasonable. The Amendment does not proscribe "warrantless searches" but instead it proscribes "unrea-

[2] The majority cites *Kremen* v. *United States*, 353 U. S. 346 (1957), as suggesting an inconsistency. There, however, in a *per curiam* opinion the Court merely overturned a general search in which the entire contents of a cabin, which it took 11 pages of fine print for the Court to inventory, were seized. See *Abel* v. *United States*, 362 U. S. 217, 239 (1960) (*Kremen* distinguished as a "mass seizure").

sonable searches" and this Court has never held nor does the majority today assert that warrantless searches are necessarily unreasonable.

Applying this reasonableness test to the area of searches incident to arrests, one thing is clear at the outset. Search of an arrested man and of the items within his immediate reach must in almost every case be reasonable. There is always a danger that the suspect will try to escape, seizing concealed weapons with which to overpower and injure the arresting officers, and there is a danger that he may destroy evidence vital to the prosecution. Circumstances in which these justifications would not apply are sufficiently rare that inquiry is not made into searches of this scope, which have been considered reasonable throughout.

The justifications which make such a search reasonable obviously do not apply to the search of areas to which the accused does not have ready physical access. This is not enough, however, to prove such searches unconstitutional. The Court has always held, and does not today deny, that when there is probable cause to search and it is "impracticable" for one reason or another to get a search warrant, then a warrantless search may be reasonable. *E. g.*, even *Trupiano* v. *United States*, 334 U. S. 699 (1948). This is the case whether an arrest was made at the time of the search or not.[3]

This is not to say that a search can be reasonable without regard to the probable cause to believe that seizable items are on the premises. But when there are exigent circumstances, and probable cause, then the search may be made without a warrant, reasonably. An

[3] Even Mr. Justice Frankfurter, joined in dissent in *Rabinowitz* by Mr. Justice Jackson, admitted that there was an exception to the search-warrant requirement in cases of necessity, and noted that this applied, for example, to vehicles which could readily be moved. 339 U. S. 56, at 73.

arrest itself may often create an emergency situation making it impracticable to obtain a warrant before embarking on a related search. Again assuming that there is probable cause to search premises at the spot where a suspect is arrested, it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search. This must so often be the case that it seems to me as unreasonable to require a warrant for a search of the premises as to require a warrant for search of the person and his very immediate surroundings.

This case provides a good illustration of my point that it is unreasonable to require police to leave the scene of an arrest in order to obtain a search warrant when they already have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant. Petitioner was arrested in his home after an arrest whose validity will be explored below, but which I will now assume was valid. There was doubtless probable cause not only to arrest petitioner, but also to search his house. He had obliquely admitted, both to a neighbor and to the owner of the burglarized store, that he had committed the burglary.[4] In light of this, and the fact that the neighbor had seen other

[4] Before the burglary of the coin store, petitioner had told its owner that he was planning a big robbery, had inquired about the alarm system in the store, the state of the owner's insurance, and the location of the owner's most valuable coins. Petitioner wandered about the store the day before the burglary. After the burglary, petitioner called the store's owner and accused him of robbing the store himself for the insurance proceeds on a policy which, as

admittedly stolen property in petitioner's house, there was surely probable cause on which a warrant could have issued to search the house for the stolen coins. Moreover, had the police simply arrested petitioner, taken him off to the station house, and later returned with a warrant,[5] it seems very likely that petitioner's wife, who in view of petitioner's generally garrulous nature must have known of the robbery, would have removed the coins. For the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable.[6]

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petitioner knew, had just been reduced from $50,000 to $10,000 coverage. On being told that the robbery had been sloppy, petitioner excitedly claimed that it had been "real professional" but then denied the robbery. On the night of the robbery itself petitioner declined an invitation to a bicycle ride, saying he was "going to knock over a place" and that a coin shop was "all set." After the robbery, he told the same neighbor that he had started to break into the coin shop, but had stopped, and then denied the whole incident. The neighbor had earlier seen stacks of typewriters in petitioner's house. Asked whether they were "hot" petitioner replied, "Hotter than a $3 bill." On reading a newspaper description of the coin store burglary, the neighbor called the police.

[5] There were three officers at the scene of the arrest, one from the city where the coin burglary had occurred, and two from the city where the arrest was made. Assuming that one policeman from each city would be needed to bring the petitioner in and obtain a search warrant, one policeman could have been left to guard the house. However, if he not only could have remained in the house against petitioner's wife's will, but followed her about to assure that no evidence was being tampered with, the invasion of her privacy would be almost as great as that accompanying an actual search. Moreover, had the wife summoned an accomplice, one officer could not have watched them both.

[6] A second arrest and search of petitioner's house occurred three days later. It relates to an entirely separate robbery of which petitioner was separately convicted and for which he was concurrently sentenced. Since no evidence was seized in the second search, and since it did not in any way affect petitioner's trial so far as the record discloses, there is no occasion to consider its propriety.

III.

This line of analysis, supported by the precedents of this Court, hinges on two assumptions. One is that the arrest of petitioner without a valid warrant [7] was constitutional as the majority assumes; the other is that the police were not required to obtain a search warrant in advance, even though they knew that the effect of the arrest might well be to alert petitioner's wife that the coins had better be removed soon. Thus it is necessary to examine the constitutionality of the arrest since if it was illegal, the exigent circumstances which it created may not, as the consequences of a lawless act, be used to justify the contemporaneous warrantless search. But for the arrest, the warrantless search may not be justified.[8] And if circumstances can justify the warrantless arrest, it would be strange to say that the Fourth Amendment bars the warrantless search, regardless of the circumstances, since the invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.

Congress has expressly authorized a wide range of officials to make arrests without any warrant in criminal cases. United States Marshals have long had this power,[9] which is also vested in the agents of the Federal

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[7] An arrest warrant was in fact issued, but it was issued on an inadequate supporting affidavit and was therefore invalid, so that the case must be considered as though no warrant had been issued.

[8] This in turn assumes that where it is practicable to obtain a search warrant and the search is not contemporaneous with an arrest, a warrant must be obtained to validate the search. This is the holding of past cases and I do not question it.

[9] Act of June 15, 1935, c. 259, § 2, 49 Stat. 378, as amended, 18 U. S. C. § 3053.

Bureau of Investigation,[10] and in the Secret Service [11] and the narcotics law enforcement agency.[12] That warrantless arrest power may apply even when there is time to get a warrant without fear that the suspect may escape is made perfectly clear by the legislative history of the statute granting arrest power to the FBI.

In *United States* v. *Coplon,* 185 F. 2d 629, 633–636 (C. A. 2d Cir. 1950), the court held that an arrest and search were invalid because there was an insufficient showing of danger of escape, and therefore there was time to obtain a warrant. The opinion, written by Judge Learned Hand and joined by Judges Swan and Frank, reviewed the common-law power of arrest, which permitted arrests for felonies committed in the past "if [the officer] had reasonable ground to suppose that the person arrested had committed the felony." However, the court concluded that this power of warrantless arrest had been limited by the congressional requirement that there must be a "likelihood of the person escaping before a warrant can be obtained for his arrest."

The next month the Congress was moved by this very decision to amend the law, consciously deleting the language upon which Judge Hand had relied so as to make it clear that warrantless arrests were authorized even if there was time to procure a warrant. Act of January 10, 1951, c. 1221, § 1, 64 Stat. 1239; H. R. Rep. No. 3228, 81st Cong., 2d Sess. (1950).[13] Thereupon, the Court of

[10] Act of June 18, 1934, c. 595, 48 Stat. 1008, as amended, 18 U. S. C. § 3052.

[11] Act of Sept. 29, 1965, 79 Stat. 890, as amended, 18 U. S. C. § 3056 (1964 ed., Supp. IV).

[12] Act of July 18, 1956, as amended, Tit. I, § 104 (a), 70 Stat. 570, 26 U. S. C. § 7607 (2).

[13] Congress' expedition was possible partly because the same change had earlier been approved by a Senatorial committee. S. Rep. No. 2464, 81st Cong., 2d Sess. (1950).

Appeals for the District of Columbia Circuit, passing on the very same arrest which had induced the congressional action, held that this "unmistakable" revision made it clear that there was in the FBI a power to arrest without warrant even when there was time to procure one. For this reason, the court upheld the arrest and contemporaneous search. *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 191 F. 2d 749 (1951). Certiorari was denied in both *Coplon* cases. 342 U. S. 920, 926 (1952). Moreover, the statute under which the FBI exercises that power was later said by this Court to state the constitutional standard, *Henry* v. *United States*, 361 U. S. 98, 100 (1959), since it requires "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony, 18 U. S. C. § 3052, before a warrantless arrest may be made. And the Court today has declined to review a warrantless arrest under the narcotics agent statute. *Jamison* v. *United States*, *post*, p. 986. See also my dissent in *Shipley* v. *California*, *post*, p. 821.

The judgment of Congress is that federal law enforcement officers may reasonably make warrantless arrests upon probable cause, and no judicial experience suggests that this judgment is infirm. Indeed, past cases suggest precisely the contrary conclusion. The validity of federal arrests was long governed by state law, *United States* v. *Di Re*, 332 U. S. 581, 589–592 (1948), and no requirement that warrants be sought whenever there is time to do so was imposed either by common-law history [14] or by decisions of this Court. This Court has upheld an execu-

[14] There was no dispute between the two *Coplon* courts on this point, since it was well established that even a private person could make a warrantless arrest at common law for a felony which had actually been committed, and a peace officer could make such an arrest if he had reasonable cause to believe the offense had been committed. 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown 71–104 (first American ed. 1847).

tive arrest warrant for deportation, permitting the arrest to occur without prior judicial scrutiny, *Abel* v. *United States*, 362 U. S. 217 (1960). And this Court has regularly affirmed the validity of warrantless arrests without any indication whatever that there was no time to get a warrant, and indeed where all the circumstances pointed to the opposite conclusion. *E. g., Ker* v. *California*, 374 U. S. 23 (1963); *Draper* v. *United States*, 358 U. S. 307 (1959). The lower federal courts have certainly been of the view that warrants are unnecessary even where there is time to obtain them. *Dailey* v. *United States*, 261 F. 2d 870 (C. A. 5th Cir. 1958), cert. denied, 359 U. S. 969 (1959) (statutory warrantless arrest by federal narcotics agents); *Smith* v. *United States*, 103 U. S. App. D. C. 48, 52, 254 F. 2d 751, 755, cert. denied, 357 U. S. 937 (1958); *Mills* v. *United States*, 90 U. S. App. D. C. 365, 196 F. 2d 600, cert. denied, 344 U. S. 826 (1952) (*sub silentio*).

In light of the uniformity of judgment of the Congress, past judicial decisions, and common practice rejecting the proposition that arrest warrants are essential wherever it is practicable to get them, the conclusion is inevitable that such arrests and accompanying searches are reasonable, at least until experience teaches the contrary. It must very often be the case that by the time probable cause to arrest a man is accumulated, the man is aware of police interest in him or for other good reasons is on the verge of flight. Moreover, it will likely be very difficult to determine the probability of his flight. Given this situation, it may be best in all cases simply to allow the arrest if there is probable cause, especially since that issue can be determined very shortly after the arrest.

Nor are the stated assumptions at all fanciful. It was precisely these facts which moved the Congress to grant to the FBI the power to arrest without a warrant without any showing of probability of flight. Both the

Senate and House committees quoted the letter of the Acting Deputy Attorney General, Peter Campbell Brown, who in asking for the new legislation asserted: "Although it is recognized that in any felony case the person to be arrested may attempt to flee, it is also recognized that in any such case in which the defendant is arrested without a warrant in an emergency situation, such defendant may be able to present a rather convincing argument that he did not intend to flee." S. Rep. No. 2464, 81st Cong., 2d Sess., 2 (1950); H. R. Rep. No. 3228, 81st Cong., 2d Sess., 2 (1950). Some weight should be accorded this factual judgment by law enforcement officials, adopted by the Congress.

IV.

If circumstances so often require the warrantless arrest that the law generally permits it, the typical situation will find the arresting officers lawfully on the premises without arrest or search warrant. Like the majority, I would permit the police to search the person of a suspect and the area under his immediate control either to assure the safety of the officers or to prevent the destruction of evidence. And like the majority, I see nothing in the arrest alone furnishing probable cause for a search of any broader scope. However, where as here the existence of probable cause is independently established and would justify a warrant for a broader search for evidence, I would follow past cases and permit such a search to be carried out without a warrant, since the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed, and also alerts the suspect to the fact of the search so that he can immediately seek judicial determination of probable cause in an adversary proceeding, and appropriate redress.

This view, consistent with past cases, would not authorize the general search against which the Fourth

Amendment was meant to guard, nor would it broaden or render uncertain in any way whatsoever the scope of searches permitted under the Fourth Amendment. The issue in this case is not the breadth of the search, since there was clearly probable cause for the search which was carried out. No broader search than if the officers had a warrant would be permitted. The only issue is whether a search warrant was required as a precondition to that search. It is agreed that such a warrant would be required absent exigent circumstances.[15] I would hold that the fact of arrest supplies such an exigent circumstance, since the police had lawfully gained entry to the premises to effect the arrest and since delaying the search to secure a warrant would have involved the risk of not recovering the fruits of the crime.

The majority today proscribes searches for which there is probable cause and which may prove fruitless unless carried out immediately. This rule will have no added effect whatsoever in protecting the rights of the criminal accused at trial against introduction of evidence seized without probable cause. Such evidence could not be introduced under the old rule. Nor does the majority

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[15] A search without a warrant "can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones* v. *United States*, 357 U. S. 493, 499; *United States* v. *Jeffers*, 342 U. S. 48, 51." *Rios* v. *United States*, 364 U. S. 253, 261 (1960); *Stoner* v. *California*, 376 U. S. 483, 486 (1964). And "a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Agnello* v. *United States*, 269 U. S. 20." *Stoner* v. *California*, *supra*, at 486; *James* v. *Louisiana*, 382 U. S. 36, 37 (1965). There is thus no question that a warrant to search petitioner's house would have been required had he not been arrested there. In such cases, the officers are not already lawfully on the premises, and there is not so often the same risk of the destruction of evidence nor the necessity to make an immediate search without the delay involved in securing a warrant.

today give any added protection to the right of privacy of those whose houses there is probable cause to search. A warrant would still be sworn out for those houses, and the privacy of their owners invaded. The only possible justification for the majority's rule is that in some instances arresting officers may search when they have no probable cause to do so and that such unlawful searches might be prevented if the officers first sought a warrant from a magistrate. Against the possible protection of privacy in that class of cases, in which the privacy of the house has already been invaded by entry to make the arrest—an entry for which the majority does not assert that any warrant is necessary—must be weighed the risk of destruction of evidence for which there is probable cause to search, as a result of delays in obtaining a search warrant. Without more basis for radical change than the Court's opinion reveals, I would not upset the balance of these interests which has been struck by the former decisions of this Court.

In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and having been arrested, he will soon be brought into contact with people who can explain his rights. As MR. JUSTICE BRENNAN noted in a dissenting opinion, joined by THE CHIEF JUSTICE and JUSTICES BLACK and DOUGLAS, in *Abel* v. *United States*, 362 U. S. 217, 249–250 (1960), a search contemporaneous with a warrantless arrest is specially safeguarded since "[s]uch an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see *Henry* v. *United States*, 361 U. S. 98, 100; and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of

probable cause is to be inquired into. Fed. Rules Crim. Proc. 5 (a) and (c). . . . *Mallory* v. *United States,* 354 U. S. 449; *McNabb* v. *United States,* 318 U. S. 332." And since that time the Court has imposed on state and federal officers alike the duty to warn suspects taken into custody, before questioning them, of their right to a lawyer. *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Orozco* v. *Texas,* 394 U. S. 324 (1969).

An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding. I would uphold the constitutionality of this search contemporaneous with an arrest since there were probable cause both for the search and for the arrest, exigent circumstances involving the removal or destruction of evidence, and satisfactory opportunity to dispute the issues of probable cause shortly thereafter. In this case, the search was reasonable.

BENTON *v.* MARYLAND.

CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND.

No. 201. Argued December 12, 1968.—Reargued March 24, 1969.—Decided June 23, 1969.

Petitioner was tried in a Maryland state court for burglary and larceny. He was acquitted of larceny but convicted of burglary and sentenced to 10 years in prison. Because the grand and petit juries in petitioner's case had been selected under an invalid constitutional provision, the case was remanded to the trial court and petitioner was given, and exercised, the option of demanding re-indictment and retrial. Re-indicted for larceny and burglary, petitioner filed, on the ground of double jeopardy, a motion to dismiss the larceny count which the trial court denied. On retrial he was found guilty of both offenses, and concurrently sentenced to 15 years for burglary and 5 years for larceny. The appellate court ruled against petitioner on the double jeopardy issue and affirmed. *Held:*

1. The concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States*, 320 U. S. 81, 105, does not constitute a jurisdictional bar to this Court's deciding petitioner's challenge to his larceny conviction, since the possibilities of adverse collateral effects to him from that conviction give the case an adversary cast and make it justiciable. Pp. 787–791.

2. Regardless of whether the concurrent sentence doctrine survives as a rule of judicial convenience, the doctrine is inapplicable here since the Maryland appellate court decided not to apply the doctrine and upheld the larceny conviction despite petitioner's double jeopardy contention, and since the status of petitioner's burglary conviction is still in some doubt. Pp. 791–793.

3. The double jeopardy prohibition of the Fifth Amendment, a fundamental ideal in our constitutional heritage, is enforceable against the States through the Fourteenth Amendment. *Palko* v. *Connecticut*, 302 U. S. 319, overruled. Pp. 793–796.

4. Petitioner's larceny conviction cannot stand, since "[c]onditioning an appeal on one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." *Green* v. *United States*, 355 U. S. 184, 193–194. Pp. 796–797.

5. The question raised by petitioner that prejudicial error resulted from the admission at his trial for both burglary and larceny of some evidence that state law made inadmissible in a trial for burglary alone was not decided by the Maryland appellate court and should now be considered by that court. Pp. 797–798.

1 Md. App. 647, 232 A. 2d 541, vacated and remanded.

M. Michael Cramer argued the cause for petitioner on the original argument and on the reargument. With him on the briefs were *H. Thomas Sisk, Laurence Levitan,* and *Paul H. Weinstein.*

Francis B. Burch, Attorney General of Maryland, argued the cause for respondent on the reargument. With him on the briefs was *Edward F. Borgerding,* First Assistant Attorney General. *Mr. Borgerding* argued the cause for respondent on the original argument. With him on the brief was *Mr. Burch.*

Peter L. Strauss argued the cause for the United States on the reargument as *amicus curiae.* With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Ronald L. Gainer.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In August 1965, petitioner was tried in a Maryland state court on charges of burglary and larceny. The jury found petitioner not guilty of larceny but convicted him on the burglary count. He was sentenced to 10 years in prison. Shortly after his notice of appeal was filed in the Maryland Court of Appeals, that court handed down its decision in the case of *Schowgurow* v. *State,* 240 Md. 121, 213 A. 2d 475 (1965). In *Schowgurow* the Maryland Court of Appeals struck down a section of the state constitution which required jurors to swear their belief in the existence of God. As a result of this decision, petitioner's case was remanded to the trial court.

Because both the grand and petit juries in petitioner's case had been selected under the invalid constitutional provision, petitioner was given the option of demanding re-indictment and retrial. He chose to have his conviction set aside, and a new indictment and new trial followed. At this second trial, petitioner was again charged with both larceny and burglary. Petitioner objected to retrial on the larceny count, arguing that because the first jury had found him not guilty of larceny, retrial would violate the constitutional prohibition against subjecting persons to double jeopardy for the same offense. The trial judge denied petitioner's motion to dismiss the larceny charge, and petitioner was tried for both larceny and burglary. This time the jury found petitioner guilty of both offenses, and the judge sentenced him to 15 years on the burglary count [1] and 5 years for larceny, the sentences to run concurrently. On appeal to the newly created Maryland Court of Special Appeals, petitioner's double jeopardy claim was rejected on the merits. 1 Md. App. 647, 232 A. 2d. 541 (1967). The Court of Appeals denied discretionary review.

On the last day of last Term, we granted certiorari, 392 U. S. 925 (1968), but limited the writ to the consideration of two issues:

> "(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?
>
> "(2) If so, was the petitioner 'twice put in jeopardy' in this case?"

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[1] The increase in petitioner's sentence on the burglary count from 10 to 15 years is presently the subject of litigation on federal habeas corpus in the lower federal courts. A federal district court ordered the State to resentence petitioner, *Benton* v. *Coppinger*, 291 F. Supp. 141 (D. C. Md. 1968), and an appeal brought by the State is presently pending in the United States Court of Appeals for the Fourth Circuit.

After oral argument, it became clear that the existence of a concurrent sentence on the burglary count might prevent the Court from reaching the double jeopardy issue, at least if we found that any error affected only petitioner's larceny conviction. Therefore, we scheduled the case for reargument, 393 U. S. 994 (1968), limited to the following additional question not included in the original writ:

> "Does the 'concurrent sentence doctrine,' enunciated in *Hirabayashi* v. *United States*, 320 U. S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York*, 390 U. S. 629, 633, n. 2, *Peyton* v. *Rowe*, 391 U. S. 54, *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238, and *Sibron* v. *New York*, 392 U. S. 40, 50–58?"

The Solicitor General was invited to file a brief expressing the views of the United States and to participate in oral argument.

After consideration of all the questions before us, we find no bar to our decision of the double jeopardy issue. On the merits, we hold that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment, and we reverse petitioner's conviction for larceny.

I.

At the outset of this case we are confronted with a jurisdictional problem. If the error specified in the original writ of certiorari were found to affect only petitioner's larceny conviction,[2] reversal of that conviction would not require the State to change the terms of

[2] See Part V, *infra*. Of course, if the error infected both counts upon which petitioner was convicted, there would be no concurrent sentence problem at all. We do not, however, resolve the question of whether the burglary conviction was "tainted."

petitioner's confinement. Whatever the status of his sentence on the larceny conviction, petitioner would probably stay in prison until he had served out his sentence for burglary.[3] Is there, in these circumstances, a live "case" or "controversy" suitable for resolution by this Court, or is the issue moot? Is petitioner asking for an advisory opinion on an abstract or hypothetical question? The answer to these questions is crucial, for it is well settled that federal courts may act only in the context of a justiciable case or controversy. *Muskrat* v. *United States*, 219 U. S. 346 (1911); see *Flast* v. *Cohen*, 392 U. S. 83, 94–97 (1968).

The language used in a number of this Court's opinions might be read to indicate that the existence of a valid concurrent sentence removes the necessary elements of a justiciable controversy. The "concurrent sentence doctrine" took root in this country quite early, although its earliest manifestations occurred in slightly different contexts. In *Locke* v. *United States*, 7 Cranch 339 (1813), a cargo belonging to the plaintiff in error had been condemned under a libel containing 11 counts. Chief Justice John Marshall, speaking for the Court, found it unnecessary to consider Locke's challenges to all 11 counts. He declared, simply enough, "The Court however, is of opinion, that the 4th count is good, and this renders it unnecessary to decide on the others." *Id.*, at 344. Similar reasoning was later applied in a case where a single general sentence rested on convictions under several counts of an indictment. Drawing upon some English cases and some dicta from Lord Mansfield,[4] the Court in *Claassen* v. *United States*, 142 U. S. 140, 146

[3] The length of that sentence is presently a matter in dispute, see n. 1, *supra*.

[4] *Grant* v. *Astle*, 2 Doug. 722, 99 Eng. Rep. 459 (1781); *Peake* v. *Oldham*, 1 Cowp. 275, 98 Eng. Rep. 1083 (1775); *Rex* v. *Benfield*, 2 Burr. 980, 97 Eng. Rep. 664 (1760).

(1891), held that if the defendant had validly been convicted on any one count "the other counts need not be considered." The most widely cited application of this approach to cases where concurrent sentences, rather than a single general sentence, have been imposed is *Hirabayashi* v. *United States,* 320 U. S. 81 (1943). In that case the defendant had been found guilty of two different offenses and had received concurrent three-month sentences. He challenged the constitutionality of both convictions, but this Court affirmed the lower court's judgment after considering and rejecting only one of his challenges. Since the conviction on the second count was valid, the Court found it "unnecessary" to consider the challenge to the first count. *Id.,* at 85, 105.

The concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions. At times the Court has seemed to say that the doctrine raises a jurisdictional bar to the consideration of counts under concurrent sentences. Some opinions have baldly declared that judgments of conviction "must be upheld" if any one count was good. *Barenblatt* v. *United States,* 360 U. S. 109, 115 (1959); see *United States* v. *Gainey,* 380 U. S. 63, 65 (1965). In other cases the Court has chosen somewhat weaker language, indicating only that a judgment "may be affirmed if the conviction on either count is valid." *Roviaro* v. *United States,* 353 U. S. 53, 59, n. 6 (1957). And on at least one occasion, the Court has ignored the rule entirely and decided an issue that affected only one count, even though there were concurrent sentences. *Putnam* v. *United States,* 162 U. S. 687 (1896).

One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine. See *United States* v. *Hines,* 256 F. 2d 561, 562–563 (C. A. 2d Cir. 1958). But whatever the underlying justifications for the doc-

trine, it seems clear to us that it cannot be taken to state a jurisdictional rule. See *Yates* v. *United States*, 355 U. S. 66, 75–76 (1957); *Putnam* v. *United States*, *supra*. Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy.

In *Sibron* v. *New York*, 392 U. S. 40 (1968), we held that a criminal case did not become moot upon the expiration of the sentence imposed. We noted "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.*, at 55. We concluded that the mere possibility of such collateral consequences was enough to give the case the "impact of actuality" which was necessary to make it a justiciable case or controversy. *Sibron* and a number of other recent cases have canvassed the possible adverse collateral effects of criminal convictions,[5] and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day.[6] Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility

[5] *Street* v. *New York*, 394 U. S. 576, 579–580, n. 3 (1969); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238 (1968); *Ginsberg* v. *New York*, 390 U. S. 629, 633–634, n. 2 (1968).

[6] The majority rule is, apparently, that all convictions handed down at the same time count as a single conviction for the purpose of habitual offender statutes, but a few States follow the stricter rule described in the text. The relevant cases are collected at 24 A. L. R. 2d 1262–1267 (1952), and in the accompanying supplements.

may well be a remote one, it is enough to give this case an adversary cast and make it justiciable. Moreover, as in *Sibron*, both of petitioner's convictions might some day be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety.

We cannot, therefore, say that this Court lacks jurisdiction to decide petitioner's challenge to his larceny conviction. It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide (as in *Hirabayashi*) that it is "unnecessary" to consider all the allegations made by a particular party.[7] The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed.

II.

While Maryland apparently agrees that there is no jurisdictional bar to consideration of petitioner's larceny conviction, it argues that the possibility of collateral consequences is so remote in this case that any double jeopardy violation should be treated as a species of "harmless error." The Solicitor General, while not commenting at length on the facts of this particular case,

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[7] In *Sibron* we noted the inadequacies of a procedure which postpones appellate review until it is proposed to subject the convicted person to collateral consequences. 392 U. S., at 56–57. For the reasons there stated, an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems. That issue is not, however, presented by this case, and accordingly we express no opinion on it.

suggests that we treat the concurrent sentence doctrine as a principle of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the rights of any party. Both Maryland and the Solicitor General argue that the defendant should bear the burden of convincing the appellate court of the need to review all his concurrent sentences. Petitioner, on the other hand, sees in *Sibron* a command that federal appellate courts treat all errors which may possibly affect a defendant's rights, and he argues that the concurrent sentence rule therefore has no continuing validity, even as a rule of convenience.

Because of the special circumstances in this case, we find it unnecessary to resolve this dispute. For even if the concurrent sentence doctrine survives as a rule of judicial convenience, we find good reason not to apply it here. On direct appeal from petitioner's conviction, the Maryland Court of Special Appeals did in fact rule on his double jeopardy challenge to the larceny count. 1 Md. App., at 650–651, 232 A. 2d, at 542–543. It is unclear whether Maryland courts always consider all challenges raised on direct appeal, notwithstanding the existence of concurrent sentences,[8] but at least in this case the State decided not to apply the concurrent sentence rule. This may well indicate that the State has some interest in keeping the larceny conviction alive;[9] if, as Maryland argues here, the larceny conviction is of no importance to either party, one wonders why the state courts found it necessary to pass on it. Since the future importance of the conviction may well turn on issues of state law about which we are not well informed, we propose, on direct appeal from the Maryland courts, to accept their judgment on this question. Since

[8] Compare *Meade* v. *State*, 198 Md. 489, 84 A. 2d 892 (1951), with *Marks* v. *State*, 230 Md. 108, 185 A. 2d 909 (1962).

[9] See n. 7, *supra*.

they decided this federal constitutional question, we see no reason why we should not do so as well. Moreover, the status of petitioner's burglary conviction and the eventual length of his sentence are both still in some doubt.[10] Should any attack on the burglary conviction be successful, or should the length of the burglary sentence be reduced to less than five years, petitioner would then clearly have a right to have his larceny conviction reviewed. As we said in *Sibron* v. *New York*, *supra*, at 56–57, it is certainly preferable to have that review now on direct appeal, rather than later.[11] For these reasons, and because there is no jurisdictional bar, we find it appropriate to reach the questions specified in our original writ of certiorari.

III.

In 1937, this Court decided the landmark case of *Palko* v. *Connecticut*, 302 U. S. 319. Palko, although indicted for first-degree murder, had been convicted of murder in the second degree after a jury trial in a Connecticut state court. The State appealed and won a new trial. Palko argued that the Fourteenth Amendment incorporated, as against the States, the Fifth Amendment requirement that no person "be subject for the same offence to be twice put in jeopardy of life or limb." The Court disagreed. Federal double jeopardy standards were not applicable against the States. Only when a kind of jeopardy subjected a defendant to "a hardship so acute and shocking that our polity will not endure it," *id.*, at 328, did the Fourteenth Amendment apply. The order

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[10] See n. 1, *supra*, and Part V, *infra*.

[11] A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for post-conviction relief. Because of our disposition of this case, we need not reach this question.

for a new trial was affirmed. In subsequent appeals from state courts, the Court continued to apply this lesser *Palko* standard. See, *e. g.*, *Brock* v. *North Carolina*, 344 U. S. 424 (1953).

Recently, however, this Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." *Washington* v. *Texas*, 388 U. S. 14, 18 (1967). In an increasing number of cases, the Court "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . .'" *Malloy* v. *Hogan*, 378 U. S. 1, 10–11 (1964).[12] Only last Term we found that the right to trial by jury in criminal cases was "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment.[13] For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled.

Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as *Betts* v. *Brady*, 316 U. S. 455 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." *Id.*, at 462. It

[12] Quoting from *Ohio ex rel. Eaton* v. *Price*, 364 U. S. 263, 275 (1960) (opinion of BRENNAN, J.).

[13] A list of those Bill of Rights guarantees which have been held "incorporated" in the Fourteenth Amendment can be found in *Duncan*, *supra*, at 148.

relied upon *Twining* v. *New Jersey*, 211 U. S. 78 (1908), which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. *Betts* was overruled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Twining*, by *Malloy* v. *Hogan*, 378 U. S. 1 (1964). Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, *supra*, at 149, the same constitutional standards apply against both the State and Federal Governments. *Palko*'s roots had thus been cut away years ago. We today only recognize the inevitable.

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence.[14] See *Bartkus* v. *Illinois*, 359 U. S. 121, 151–155 (1959) (BLACK, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of *autrefoits acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." [15] Today, every State incorporates some form of the prohibition in its constitution or common law.[16] As this Court put it in *Green* v. *United States*, 355 U. S. 184, 187–188 (1957), "[t]he underlying

[14] J. Sigler, Double Jeopardy 1–37 (1969).

[15] 4 W. Blackstone, Commentaries *335.

[16] Sigler, *supra*, n. 14, at 78–79; *Brock* v. *North Carolina*, 344 U. S. 424, 435, n. 6 (1953) (Vinson, C. J., dissenting).

idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice." The validity of petitioner's larceny conviction must be judged, not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision.

IV.

It is clear that petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied. Petitioner was acquitted of larceny in his first trial. Because he decided to appeal his burglary conviction, he is forced to suffer retrial on the larceny count as well. As this Court held in *Green* v. *United States*, *supra*, at 193–194, "[c]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy."

Maryland argues that *Green* does not apply to this case because petitioner's original indictment was absolutely void. One cannot be placed in "jeopardy" by a void indictment, the State argues. This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this "void" indictment had he not appealed his burglary conviction. Only by accepting the option of a new trial could the in-

dictment be set aside; at worst the indictment would seem only voidable at the defendant's option, not absolutely void. In any case, this argument was answered here over 70 years ago in *United States* v. *Ball*, 163 U. S. 662 (1896). In that case Millard Fillmore Ball was indicted, together with two other men, for the murder of one William T. Box in the Indian Territory. He was acquitted and his codefendants were convicted. They appealed and won a reversal on the ground that the indictment erroneously failed to aver the time or place of Box's death. All three defendants were retried, and this time Ball was convicted. This Court sustained his double jeopardy claim, notwithstanding the technical invalidity of the indictment upon which he was first tried. The Court refused to allow the Government to allege its own error to deprive the defendant of the benefit of an acquittal by a jury. *Id.*, at 667–668. "[A]lthough the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error . . . ," and the Government could not have the acquittal set aside over the defendant's objections. *Id.*, at 669–670. This case is totally indistinguishable. Petitioner was acquitted of larceny. He has, under *Green*, a valid double jeopardy plea which he cannot be forced to waive. Yet Maryland wants the earlier acquittal set aside, over petitioner's objections, because of a defect in the indictment. This it cannot do. Petitioner's larceny conviction cannot stand.

V.

Petitioner argues that his burglary conviction should be set aside as well. He contends that some evidence, inadmissible under state law in a trial for burglary alone, was introduced in the joint trial for both burglary and larceny, and that the jury was prejudiced by this evi-

dence.[17] This question was not decided by the Maryland Court of Special Appeals because it found no double jeopardy violation at all. It is not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation. To determine whether there is in fact any such evidentiary error, we would have to explore the Maryland law of evidence and the Maryland definitions of larceny and burglary, and then examine the record in detail. We do not think that this is the kind of determination we should make unaided by prior consideration by the state courts.[18] Accordingly, we think it "just under the circumstances," 28 U. S. C. § 2106, to vacate the judgment below and remand for consideration of this question. The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

While I agree with the Court's extension of the prohibition against double jeopardy to the States, and with the Court's conclusion that the concurrent sentence rule constitutes no jurisdictional bar, additional comment on the wisdom and effects of applying a concurrent sentence rule seems appropriate.

In a time of increasingly congested judicial dockets, often requiring long delays before trial and upon appeal,

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[17] There is no danger here that the jury might have been tempted to compromise on a lesser charge because of an erroneous retrial on a greater charge. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 866 (C. A. 2d Cir. 1965), cert. denied, *sub nom. Mancusi* v. *Hetenyi*, 383 U. S. 913 (1966). Larceny is a lesser offense than burglary.

[18] See Note, Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making, 81 Harv. L. Rev. 1260, 1272–1273 (1968).

judicial resources have become scarce. Where a man has been convicted on several counts and sentenced concurrently upon each, and where judicial review of one count sustains its validity, the need for review of the other counts is not a pressing one since, regardless of the outcome, the prisoner will remain in jail for the same length of time under the count upheld. Rather than permit other cases to languish while careful review of these redundant counts is carried to its futile conclusion, judicial resources might be better employed by moving on to more pressing business. This is not a rule of convenience to the judge, but rather of fairness to other litigants.

This is not to say, however, that the fact of conviction under the unreviewed counts could never be of importance to the prisoner. After his release it is possible they might be used against him in a recidivism prosecution, or used to impeach his testimony in a trial for another offense, to pick two obvious examples. Nevertheless, the unreviewed counts are, by hypothesis, not of immediate importance to his confinement, and our experience gives us no indication that they are frequently of such importance later that the concurrent sentence rule should not be applied.

The unreviewed count is often one which, but for the concurrent sentence rule, the prisoner would have a right to challenge, either directly or on collateral attack. Arguably, to deny him that right when another man, convicted after a separate trial on each count, or sentenced consecutively, could not be denied that right under the applicable state or federal law, raises an equal protection question. But clearly so long as the denied review is of no significance to the prisoner the denial of equal protection is not invidious but only theoretical.

But should a situation arise in which the convict can demonstrate that the unreviewed count is being used

against him, so as to work some harm to him additional to that stemming from the reviewed count, his grievance becomes real. At that point it may be that the unreviewed count may not be used against him, unless it is determined that the lack of earlier review can be cured by then supplying the convict the review to which he would earlier have been entitled but for his concurrent sentence on another count. For myself, postponed review, a question which the Court reserves (*ante*, at 791, n. 7), presents no insuperable difficulties. Appellate review is always conducted on a cold record, and collateral proceedings frequently deal with a stale record and stale facts. There is nothing inherently unfair in permitting the record to become colder while it is irrelevant to any human need, and other litigants' demands are more pressing. Whether reversal on such a record, after delayed review, would permit retrial or a hearing on a claim involving, for example, a coerced confession, is yet a further question which there is no present need to address. Should a satisfactory hearing or retrial prove impossible this would be an unfortunate byproduct of an initially crowded docket.

For the foregoing reasons, I agree with the Court that the concurrent sentence rule, while not of jurisdictional dimensions, should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts. It may be that where it can be reliably predicted in a particular case that each count would entail concrete prejudicial consequences at a later date, the appellate court at the time of initial review would prefer to deal with all counts rather than to apply the concurrent sentence rule.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

One of the bedrock rules that has governed, and should continue to govern, the adjudicative processes of this Court is that the decision of constitutional questions in the disposition of cases should be avoided whenever fairly possible. Today the Court turns its back on that sound principle by refusing, for the flimsiest of reasons, to apply the "concurrent sentence doctrine" so as not to be required to decide the far-reaching question whether the Double Jeopardy Clause of the Fifth Amendment is "incorporated" into the Due Process Clause of the Fourteenth, thereby making the former applicable lock, stock, and barrel to the States. Indeed, it is quite manifest that the Court has actually been at pains to "reach out" to decide that very important constitutional issue.

I consider that the concurrent sentence doctrine is applicable here, and that dismissal of the writ is accordingly called for. Despite that, I feel constrained also to express my views on the merits because of what I conceive to be the importance of the constitutional approach at stake.

I.

The Court decides, and I agree, that petitioner's larceny conviction is not moot, and that the concurrent sentence doctrine is not a *jurisdictional* bar to entertainment of challenges to multiple convictions, so long as the convictions sought to be reviewed are not moot. However, I would also emphasize, in agreement with the position of the Government as *amicus curiae*, that the concurrent sentence rule does have continuing vitality as an element of judicial discretion, and that appellate courts may decline to review a conviction carrying a concurrent sentence when another "concurrent" convic-

tion has been reviewed and found valid and the unreviewed conviction foreseeably will have no significant adverse consequences for the appellant. As the Solicitor General has pointed out, the concurrent sentence doctrine plays a significant role in conserving the time and energy of appellate courts.[1] To require that these already overworked courts[2] invariably review in full detail each of several convictions carrying concurrent sentences seems to me senselessly doctrinaire.[3]

A.

As has been noted, the concurrent sentence doctrine is applicable only if there exists a valid concurrent conviction. In this instance, petitioner's double jeopardy argument is directed to his larceny conviction, but he claims that the concurrent sentence doctrine is no impediment to reaching that question because his concurrent, and otherwise valid, burglary conviction was tainted by having been tried together with the larceny count. It is therefore necessary to consider whether this claim of taint has merit.

The Court finds that resolution of the taint issue is likely to involve such difficult points of Maryland law as to make a remand to the Maryland courts the soundest course. See *ante*, at 797–798. However, my examination

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[1] See Memorandum for the United States as Amicus Curiae 20–23. Counsel for the Government estimated during oral argument that the concurrent sentence doctrine is employed in the disposition of about 10% of all federal criminal appeals.

[2] See, *e. g.*, Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969).

[3] Like the Court, see *ante*, at 791, n. 7, I express no view on the question whether collateral consequences may constitutionally be imposed on account of a conviction which was denied review on direct appeal because of the concurrent sentence doctrine.

of the question convinces me that the pertinent Maryland law is quite elementary. And, unlike the Court, I am not deterred by the prospect of having to "examine . . . in detail," *ante*, at 798, the 42-page record of petitioner's second trial.

I conclude that there was no real possibility of taint. Burglary in Maryland consists of breaking and entering any dwelling house in the nighttime with intent to steal, take, or carry away the personal goods of another. See Md. Code Ann., Art. 27, § 30 (a) (1967). Larceny in Maryland is a common-law crime, consisting of the taking and carrying away of the personal property of another with intent to deprive the owner of the property permanently. See, *e. g.*, *Fletcher* v. *State*, 231 Md. 190, 189 A. 2d 641 (1963). Evidence was introduced at petitioner's second trial to show that he not only entered a locked house at night but also made off with several household appliances. The latter evidence was, of course, pertinent to the larceny count. However, it was also plainly relevant to the burglary count, since it tended to show intent to steal.

Petitioner bases his taint argument primarily on the proposition that he was entitled to have the evidence concerning the missing appliances excluded from his second trial under the doctrine of "collateral estoppel," he having been acquitted of larceny at the first trial. However, even if it is assumed that the conviction on the larceny count was bad on double jeopardy or due process grounds and that the principle of collateral estoppel has some application to state criminal trials through the Due Process Clause of the Fourteenth Amendment,[4] I think that the doctrine would not prevent

[4] This Court said in dictum in *Hoag* v. *New Jersey*, 356 U. S. 464, 471 (1958): "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional

admission of the evidence on the issue of burglary. The principle of collateral estoppel makes conclusive, in collateral proceedings, only those matters which were "actually litigated and determined in the original action . . . ." *Cromwell* v. *County of Sac*, 94 U. S. 351, 353 (1877).[5] The Maryland Constitution provides:

> "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Md. Const., Art. 15, § 5.

Hence, petitioner's acquittal of larceny at his first trial may have rested solely upon that jury's unique view of the *law* concerning that offense, and cannot be taken as having necessarily "determined" any particular question of fact.

It follows from what has been said in this section that there can be no estoppel effect in a collateral proceeding, such as petitioner's second trial for burglary, and that petitioner's taint argument must fail.[6]

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requirement. Certainly this Court has never so held." See also *id.*, at 470–471; *Sealfon* v. *United States*, 332 U. S. 575 (1948); *United States* v. *Oppenheimer*, 242 U. S. 85, 88 (1916).

[5] See also Restatement, Judgments § 68 (1).

[6] The Court also suggests that the concurrent sentence doctrine should not be applied for the additional reason that the eventual length of petitioner's burglary sentence is "still in some doubt." See *ante*, at 793. Petitioner received a 10-year sentence following his first burglary conviction and a 15-year sentence after his second conviction. The latter sentence was subsequently vacated and resentencing ordered by a federal district court. See *Benton* v. *Copinger*, 291 F. Supp. 141 (1968). The State has appealed. Whatever the outcome of that appeal, I consider that the probability of petitioner's burglary sentence being reduced below five years, so as to make the concurrent sentence doctrine inoperative, is manifestly negligible.

B.

Since petitioner's second burglary conviction was not tainted by his simultaneous trial for larceny, it is necessary to consider whether the concurrent sentence doctrine is inapplicable for the other possible reason: that petitioner foreseeably will suffer significant adverse consequences on account of his larceny conviction.[7]

No such consequences can reasonably be predicted. The Court itself notes that only a "few States" would allow petitioner's larceny conviction to be used against him for purposes of sentencing as a habitual offender, and concedes that "this possibility may well be a remote one." *Ante*, at 790–791. When it is recalled that petitioner had been convicted of three felonies even prior to his present burglary conviction,[8] this possibility is reduced to the vanishing point.[9]

There remain the possibilities that petitioner's larceny conviction might be considered generally by a judge if and when petitioner is sentenced following some future conviction, and that the conviction might be used to impeach him in future judicial proceedings. In the circumstances of this case, these potential consequences are plainly insignificant. Petitioner's burglary and larceny convictions were based upon the very same series of acts on his part. This fact could readily be brought to the attention either of a sentencing judge or of a trier of fact before whom petitioner was sought to be impeached. Predictably, knowledge of the identical origin of the two convictions would reduce the extra impact of the

[7] Cf., *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 55–56 (1968).

[8] See Supplementary Brief for Respondent 20, n. 6.

[9] So far as I have been able to discover, there is no State in which petitioner's larceny conviction could have habitual offender consequences.

larceny conviction to negligible proportions. Thus, it would be difficult to imagine a case in which a "concurrent" conviction would be likely to entail fewer adverse consequences.

C.

The Court nonetheless holds that "[b]ecause of the special circumstances in this case" it will not apply the concurrent sentence doctrine, and that it is unnecessary even to decide whether the doctrine has "continuing validity, even as a rule of convenience." See *ante*, at 792. One of the "special circumstances" cited by the Court is the existence of the "taint" issue, which the Court finds it desirable to remand to the state courts. As has been noted, I can perceive no difficulties which would justify a remand.

The second of the "special circumstances" relied on by the Court is that "in this case the [state courts] decided not to apply the concurrent sentence rule" and reached the "double jeopardy" issue themselves. See *ante*, at 792. The Court concludes that "[s]ince [the Maryland courts] decided this federal constitutional question, we see no reason why we should not do so as well." See *ante*, at 792–793. This reasoning baffles me. In determining whether or not to reach a constitutional issue the decision of which is not absolutely necessary to the disposition of a case, this Court has long been guided by the rule that "[w]here a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 193 (1909); see *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis, J., concurring). In deciding whether such "important reasons" exist, this Court has never regarded itself as bound to reach the constitutional issue merely because the court below did so, and has often declined to pass

upon constitutional questions even though fully canvassed by the lower court.[10] On some of these occasions, the Court has relied in justification upon the concurrent sentence doctrine.[11]

Since I cannot believe that the Court wishes as a general matter to abandon the salutary and well-established principle of declining to rule on constitutional questions in advance of necessity, and since I find the "taint" issue entirely free of the complexities which the Court claims to perceive, I cannot help but conclude that the real reason for reaching the "double jeopardy" issue in this case is the Court's eagerness to see that provision "incorporated" into the Fourteenth Amendment and thus made applicable against the States.

D.

As has been shown, this case satisfies both preconditions to application of the concurrent sentence doctrine. Reliance upon that doctrine would enable the Court to avoid decision of a substantial constitutional question. Accordingly, I would apply the concurrent sentence rule and decline to review petitioner's larceny conviction. Since the case was brought here on a writ of certiorari limited to the "double jeopardy" question, decision of which would affect only the larceny conviction, I would dismiss the writ as improvidently granted.

II.

Having concluded that the writ should be dismissed, I would ordinarily not go further. However, as indicated at the outset, I feel impelled to continue with

[10] See, *e. g.*, *Cichos* v. *Indiana*, 385 U. S. 76 (1966); *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964); *Bell* v. *Maryland*, 378 U. S. 226 (1964); *Machinists* v. *Street*, 367 U. S. 740 (1961); *Rice* v. *Sioux City Cemetery*, 349 U. S. 70 (1955).

[11] See, *e. g.*, *United States* v. *Gainey*, 380 U. S. 63 (1965); *Barenblatt* v. *United States*, 360 U. S. 109 (1959).

some observations respecting what can only be regarded as a complete overruling of one of this Court's truly great decisions, and with an expression of my views as to how petitioner's claim respecting his retrial for larceny should fare under the traditional due process approach.

A.

I would hold, in accordance with *Palko* v. *Connecticut*, 302 U. S. 319 (1937), that the Due Process Clause of the Fourteenth Amendment does not take over the Double Jeopardy Clause of the Fifth, as such. Today *Palko* becomes another casualty in the so far unchecked march toward "incorporating" much, if not all, of the Federal Bill of Rights into the Due Process Clause. This march began, with a Court majority, in 1961 when *Mapp* v. *Ohio*, 367 U. S. 643, was decided and, before the present decision, found its last stopping point in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), decided at the end of last Term. I have at each step in the march expressed my opposition, see, *e. g.*, my opinions in *Mapp* v. *Ohio*, *supra*, at 672 (dissenting); *Ker* v. *California*, 374 U. S. 23, 44 (1963) (concurring in result); *Malloy* v. *Hogan*, 378 U. S. 1, 14 (1964) (dissenting); *Pointer* v. *Texas*, 380 U. S. 400, 408 (1965) (concurring in result); *Griffin* v. *California*, 380 U. S. 609, 615 (1965) (concurring); *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (1967) (concurring in result); and *Duncan* v. *Louisiana*, *supra*, at 171 (dissenting); more particularly in the *Duncan* case I undertook to show that the "selective incorporation" doctrine finds no support either in history or in reason.[12] Under the pressures of the closing days of

[12] In the interest of strict accuracy, it should be pointed out that MR. JUSTICE STEWART cannot and does not fully join in the above sentence of this opinion. He joined my dissenting opinion in *Duncan* v. *Louisiana*, *supra*, but wrote a separate memorandum in *Mapp* v. *Ohio*, *supra*, at 672; joined the opinion of Mr. Justice Clark in *Ker* v. *California*, *supra*; joined MR. JUSTICE WHITE's dissenting

the Term, I am content to rest on what I have written in prior opinions, save to raise my voice again in protest against a doctrine which so subtly, yet profoundly, is eroding many of the basics of our federal system.

More broadly, that this Court should have apparently become so impervious to the pervasive wisdom of the constitutional philosophy embodied in *Palko*, and that it should have felt itself able to attribute to the perceptive and timeless words of Mr. Justice Cardozo nothing more than a "watering down" of constitutional rights, are indeed revealing symbols of the extent to which we are weighing anchors from the fundamentals of our constitutional system.

B.

Finally, how should the validity of petitioner's larceny conviction be judged under *Palko*, that is, under due process standards?

A brief recapitulation of the facts first seems advisable. Petitioner was indicted and tried simultaneously for burglary and larceny. He was acquitted of larceny but convicted of burglary. Petitioner appealed, and the Maryland courts remanded in light of earlier Maryland decisions holding invalid a provision of the Maryland Constitution requiring that grand and petit jurors declare their belief in God. Petitioner was given the option either of accepting the result of his trial or of demanding re-indictment and retrial. He chose to attack the indictment, was re-indicted and retried for both larceny and burglary, and was convicted of both offenses.

The principle that an accused should not be tried twice for the same offense is deeply rooted in Anglo-American

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opinion in *Malloy* v. *Hogan*, *supra*, at 33; wrote an opinion concurring in the result in *Pointer* v. *Texas*, *supra*, at 409; wrote a dissenting opinion in *Griffin* v. *California*, *supra*, at 617; and separately concurred in the result in *Klopfer* v. *North Carolina*, *supra*, at 226.

law.[13] In this country, it is presently embodied in the Fifth Amendment to the Federal Constitution and in the constitution or common law of every State.[14] The *Palko* Court found it unnecessary to decide "[w]hat the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him . . . ." 302 U. S., at 328. However, I have no hesitation in stating that it would be a denial of due process at least for a State to retry one previously acquitted following an errorless trial. The idea that the State's interest in convicting wrongdoers is entirely satisfied by one fair trial ending in an acquittal, and that the accused's interest in repose must thereafter be given precedence, is indubitably a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.*, at 325.

The situation in this case is not quite so simple. Had petitioner not appealed his burglary conviction, the State would surely have allowed him to rest on his larceny acquittal and merely serve out his burglary sentence. However, the State argues that the burglary and larceny counts were originally contained in a single indictment; that upon petitioner's appeal the indictment was declared totally void and the trial court found to have lacked jurisdiction; and that the State could then proceed as if there had never been a previous indictment or trial.

The State's contention that petitioner's first trial was a complete nullity because the trial court "lacked juris-

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[13] The "double jeopardy" concept has been an established part of the English common law since at least 1700, and was contained in the constitutions or common law of many American jurisdictions prior to 1787. See J. Sigler, Double Jeopardy 1–37 (1969); *Bartkus v. Illinois*, 359 U. S. 121, 151–155 (1959) (BLACK, J., dissenting).

[14] See Sigler, *supra*, at 77–117.

diction" is unconvincing. As has been noted, it appears that the State would willingly have seen petitioner serve out the burglary sentence imposed in consequence of that trial. Under state procedure, petitioner could avail himself of the "jurisdictional" defect only by appealing his conviction. The crucial issue, therefore, is what legitimate interest had the State in compelling petitioner to jeopardize his larceny acquittal as a condition of appealing his burglary conviction?

I can perceive no legitimate state interest. Certainly it is the purest fiction to say that by appealing his burglary conviction petitioner "waived" his right not to be retried for larceny or "consented" to retrial on that charge. The notion of "waiver" was first employed in *United States* v. *Ball*, 163 U. S. 662 (1896), to justify retrial of an accused for the same offense following reversal of a conviction on appeal. The "waiver" doctrine was more fully articulated in *Trono* v. *United States*, 199 U. S. 521 (1905), where it was held that retrial and conviction for murder following a successful appeal from a manslaughter conviction did not violate the Double Jeopardy Clause.[15] *Trono* apparently dictated the result in *Brantley* v. *Georgia*, 217 U. S. 284 (1910), in which the Court held in a brief *per curiam*, without citing any authority, that a Georgia retrial and conviction for murder following the reversal on appeal of an earlier manslaughter conviction did not amount to "a case of twice in jeopardy under any view of the Constitution of the United States." *Id.*, at 285.[16] We have since

[15] In the federal realm, the *Trono* decision was, of course, limited to its "peculiar factual setting" by *Green* v. *United States*, 355 U. S. 184, 197 (1957), in which I joined the dissenting opinion of Mr. Justice Frankfurter, *id.*, at 198. MR. JUSTICE STEWART was not a member of the Court at the time *Green* was decided.

[16] *Trono* was the only federal decision cited by the State of Georgia in its brief in *Brantley*.

recognized that the "waiver" rationale is a "conceptual abstraction" which obscures rather than illuminates the underlying clash of societal and individual interests. See *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Accordingly, I do not think that the reasoning in *Trono* or the apparent holding in *Brantley*, insofar as they would require affirmance of petitioner's larceny conviction, can any longer be regarded as good law.

Nor did the State in the present case have the sorts of interests which have been held to justify retrial for the same offense after a conviction has been reversed on appeal by the accused and in the more unusual case when an acquittal has been set aside following an appeal by the State.[17] When the accused has obtained a reversal on appeal, the societal interest in convicting the guilty has been deemed too weighty to permit every such accused to be "granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, *supra*, at 466. The rationale for allowing the State to appeal an acquittal has been that the State, like the accused, is entitled to assure itself of a trial "free from the corrosion of substantial legal error" which might have produced an adverse verdict. See *Palko* v. *Connecticut*, *supra*, at 328.[18]

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[17] For more detailed analyses of these interests, see generally Mayers & Yarbrough, *Bis Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1 (1960); Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965); Comment, Twice in Jeopardy, 75 Yale L. J. 262 (1965); Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272 (1964).

[18] However, in the federal system it has been held that the Government may not appeal from an acquittal without placing the accused "a second time in jeopardy for the same offense." *Kepner* v. *United States*, 195 U. S. 100, 133 (1904). See also *id.*, at 134–137 (Holmes, J., dissenting).

In the present case, the State did not appeal, and the defect in the composition of the grand jury could not have affected petitioner's subsequent acquittal at trial. Society's legitimate interest in punishing wrongdoers could have been fully vindicated by retrying petitioner on the burglary count alone, that being the offense of which he was previously convicted. The State had no more interest in compelling petitioner to stand trial again for larceny, of which he had been acquitted, than in retrying any other person declared innocent after an error-free trial. His retrial on the larceny count therefore, in my opinion, denied due process, and on that ground reversal would be called for under *Palko*.

VON CLEEF ET AL. *v.* NEW JERSEY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY.

No. 837. Decided June 23, 1969.

Petitioner Von Cleef was arrested on the third floor of a 16-room house in which she lived. Police, without a search warrant, then searched the entire house and seized several thousand articles, many of which were introduced at trial. The New Jersey courts concluded that the search and seizures were constitutionally permissible as incident to a valid arrest. *Held:* It is not necessary to decide whether *Chimel* v. *California, ante,* p. 752, applies retroactively, as the scope of the search and seizures here was "beyond the sanction of any" previous decision, *Kremen* v. *United States,* 353 U. S. 346, 347.

Certiorari granted; 102 N. J. Super. 102, 245 A. 2d 495, reversed and remanded.

Herald Price Fahringer for petitioners.

Paul Murphy for respondent.

PER CURIAM.

The petitioners were convicted in a New Jersey trial court of conspiring to maintain a building for purposes of lewdness and to commit acts of lewdness, N. J. Rev. Stat. §§ 2A:98–1, 2A:133–2, 2A:115–1; permitting a building to be used for purposes of lewdness, N. J. Rev. Stat. § 2A:133–2 (b); and possessing with intent to utter obscene publications, N. J. Rev. Stat. § 2A:115–2. Their convictions were affirmed by the Superior Court, Appellate Division, 102 N. J. Super. 102, 245 A. 2d 495, and the Supreme Court of New Jersey denied review, 52 N. J. 499, 246 A. 2d 456. The petitioners make several arguments, but their principal contention is that evidence introduced at their trial was secured in violation of the Fourth and Fourteenth Amendments.

Petitioner Von Cleef was arrested on the third floor of a 16-room house in which she and petitioner Beard lived. Although no search warrant had been issued, several policemen proceeded to search the entire house for a period of about three hours. They eventually seized several thousand articles, including books, magazines, catalogues, mailing lists, private correspondence (both opened and unopened), photographs, drawings, and film. The petitioners' motion to suppress was denied, and "a considerable number" of the items seized were introduced into evidence by the prosecution and "commented upon by several witnesses during the trial." 102 N. J. Super., at 109, 245 A. 2d, at 499.

The petitioners attack the New Jersey courts' conclusion that the search and seizures described above were constitutionally permissible as being incident to a valid arrest. This challenge would unquestionably be well founded if today's decision in *Chimel* v. *California, ante,* p. 752, were given retroactive application. But we need not decide here whether *Chimel* should be applied retroactively. For even under the constitutional standards prevailing before *Chimel,* see *United States* v. *Rabinowitz,* 339 U. S. 56; *Harris* v. *United States,* 331 U. S. 145, the search and seizures involved here were constitutionally invalid.

New Jersey relies primarily on *United States* v. *Rabinowitz, supra,* in which this Court upheld the search of a one-room business office and the seizure of 573 stamps with forged overprints. But the Court's opinion in *Rabinowitz* specifically referred to the factors that were thought to make the search in that case reasonable:

> "(1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent;

(4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money." 339 U. S., at 64.

Although the arrest of petitioner Von Cleef may for our purposes be assumed to have been lawful (the petitioners argue that it was not), the factual circumstances here are otherwise quite different from those of *Rabinowitz*. Even the facts of *Harris* v. *United States, supra*—in which the search of a four-room apartment and the seizure of an envelope containing altered Selective Service documents were sustained on the ground that they were contemporaneous with a lawful arrest—are a far cry from those of this case. While *Rabinowitz* made the principles governing searches accompanying arrests unfortunately hazy, see *Chimel* v. *California, supra*, at 766, we have no hesitation in concluding that the action of the police here in combing a three-story, 16-room house from top to bottom and carting away several thousand papers, publications, and other items cannot under any view of the Fourth Amendment be justified as "incident to arrest." Like the search and "mass seizure" in *Kremen* v. *United States*, 353 U. S. 346, see *Abel* v. *United States*, 362 U. S. 217, 239, such action is simply "beyond the sanction of any of our cases." 353 U. S., at 347.

Accordingly, the petition for a writ of certiorari is granted, the judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE WHITE concur in granting certiorari but dissent from reversal of the judgment and remand of the case without a hearing.

MR. JUSTICE HARLAN, concurring in the result.

Unfortunately, I remain unconvinced that the search in this case may be properly distinguished from the search tolerated by the Court in *Harris* v. *United States*, 331 U. S. 145 (1947). Nor do I believe that our decision in *Kremen* v. *United States*, 353 U. S. 346 (1957) proscribes this search. *Kremen* simply prohibits the police from seizing the entire contents of a building indiscriminately, without considering whether the property they take is relevant to the crime under investigation; it does not bar the removal of all property that may reasonably be considered evidence of crime. The Appellate Division of the New Jersey Superior Court properly found that the police in the case before us did not engage in the practice condemned in *Kremen:* "[T]he search was extensive, but under the circumstances it was reasonable . . . *the items searched for and seized related to the criminal operation for which the arrest had been made.*" (Emphasis supplied.) Surely, there is no reason to condemn a search as resulting in a "mass seizure" simply because it uncovers abundant evidence of wrongdoing. And yet, that is what the Court does today in relying on *Kremen* to decide this case.

Consequently, I am obliged to reach the question whether the stricter Fourth Amendment standards announced today in *Chimel* v. *California, ante,* p. 752, govern this case; for in my view, it is only if *Chimel* is applicable that we may legitimately reverse the judgment of the New Jersey courts. Since I have reached the conclusion that all cases still subject to direct review by this Court should be governed by any "new" rule of constitutional law announced in our decisions, see my dissent in *Desist* v. *United States*, 394 U. S. 244, 256 (1969), I join in the Court's judgment.

SHIPLEY *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 540, Misc. Decided June 23, 1969.

Police officers, informed that petitioner was involved in a robbery, went to his residence and in petitioner's absence were allowed to enter by his "wife" and search her belongings. They found some rings taken by the robbers and then "staked out" the house. When petitioner arrived the officers arrested him as he alighted from his car, which was parked 15 or 20 feet from the house. They searched petitioner and the car, and without permission or a warrant again searched the house. They found a jewelry case stolen in the robbery, which was admitted into evidence at petitioner's trial, the trial court having upheld the second search as incident to the arrest. Petitioner was convicted, and the appellate court affirmed. *Held:* It is not necessary to decide if *Chimel* v. *California, ante,* p. 752, applies retroactively, the search clearly having violated the Fourth Amendment as made applicable to the States by the Fourteenth, since it has never been constitutionally permissible for the police, absent an emergency, to arrest a person *outside* his home and then take him inside for the purpose of conducting a warrantless search.

Certiorari granted; reversed and remanded.

Kate Whyner for petitioner.

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Marvin A. Bauer,* Deputy Attorney General, for respondent.

PER CURIAM.

The petitioner was convicted in California of robbery in the first degree, and the conviction was affirmed by the Court of Appeal, Second Appellate District. The California Supreme Court denied review. The petitioner seeks reversal of the judgment below on the ground that evidence introduced at his trial was seized in viola-

tion of the Fourth and Fourteenth Amendments to the United States Constitution. Since we agree with the petitioner that the evidence was taken in the course of an unconstitutional search of his home, the judgment of the California Court of Appeal must be reversed. *Mapp* v. *Ohio*, 367 U. S. 643.

Informed that the petitioner had been involved in a robbery, police officers went to his residence. The petitioner was not at home, but a 15-year-old girl who identified herself as the petitioner's wife allowed the officers to enter and search her belongings. When several rings taken by the robbers were found, the officers "staked out" the house and awaited the petitioner's return. Upon his arrival late that night, he was immediately arrested as he alighted from his car. The officers searched the petitioner and the car, and then again entered and searched the house, where they discovered under a couch a jewelry case stolen in the robbery. The car was parked outside the house and 15 or 20 feet away from it, and the officers did not request permission to conduct the second search of the house. No warrant was ever obtained. The trial court nevertheless upheld the second search on the ground that it was incident to the petitioner's arrest, and the Court of Appeal agreed, holding that the area searched was "under the [petitioner's] effective control" at the time of the arrest.

Under our decision today in *Chimel* v. *California, ante*, p. 752, the search clearly exceeded Fourth Amendment limitations on searches incident to arrest. But even if *Chimel* were to have no retroactive application—a question which we reserve for a case which requires its resolution—there is no precedent of this Court that justifies the search in this case. The Court has consistently held that a search "can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest."

Stoner v. *California*, 376 U. S. 483, 486. (Emphasis supplied.) At the very most, police officers have been permitted to search a four-room apartment in which the arrest took place. *Harris* v. *United States*, 331 U. S. 145. See also *United States* v. *Rabinowitz*, 339 U. S. 56. But the Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person *outside* his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, "it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest *therein*." *Agnello* v. *United States*, 269 U. S. 20, 32. (Emphasis supplied.) And in *James* v. *Louisiana*, 382 U. S. 36, the Court held that the search of the petitioner's home after his arrest on the street two blocks away "cannot be regarded as incident to his arrest." *Id.*, at 37. Since the thorough search of the petitioner's home extended without reasonable justification beyond the place in which he was arrested, it cannot be upheld under the Fourth and Fourteenth Amendments as incident to his arrest.*

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in granting certiorari but dissents from the reversal and remand of the judgment without a hearing.

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*Because of our disposition of the case on this ground, we find it unnecessary to consider the contentions of the petitioner that his "wife" did not voluntarily consent to the first search, and that the officers lacked probable cause to arrest the petitioner.

MR. JUSTICE WHITE, dissenting.

I found inexplicable the Court's acceptance of the warrantless arrest in *Chimel* v. *California, ante,* p. 752, while at the same time holding the contemporaneous search invalid without considering the exigencies created by the arrest itself. See *id.,* p. 770 (dissenting opinion). Even more mystifying are the opinions and the orders issued in the instant case and six others which have been held pending the decision in *Chimel:* No. 837, *Von Cleef* v. *New Jersey, ante,* p. 814; No. 1097, Misc., *Harris* v. *Illinois, post,* p. 985; No. 1037, Misc., *Mahoney* v. *LaVallee, post,* p. 985; No. 500, *Schmear* v. *Gagnon, post,* p. 978; No. 550, Misc., *Jamison* v. *United States, post,* p. 986; and No. 395, Misc., *Chrisman* v. *California, post,* p. 985. I fear that the summary dispositions in these cases, which strain so hard to avoid deciding the retroactivity of *Chimel,* will only magnify the confusion in this important area of the law.

It is particularly hard to square the Court's summary reversal of Shipley's conviction, which invalidates a warrantless search of a house where the arrest was made in a detached garage, with the denials of certiorari in *Harris* and *Mahoney.* In *Harris,* the arrest occurred in the lobby of a four-story apartment building; the ensuing search without a warrant involved an apartment on an upper floor. The chronology was reversed in *Mahoney* where petitioner was arrested in his apartment, but the accompanying search uncovered a gun in the building basement. This case, *Shipley,* purports to rest on pre-*Chimel* law, but certiorari in *Harris* and *Mahoney* cannot be denied without assuming the nonretroactivity of *Chimel* and then determining that these cases do not deserve the same summary reversal given to *Shipley.* In *Schmear, Jamison,* and *Chrisman,* as in *Chimel,* the Court fails to find a substantial issue in the warrantless

arrest and its bearing on the warrantless search. Finally, the *per curiam* in *Von Cleef* invokes *Kremen* v. *United States*, 353 U. S. 346 (1957), without noting that the seizures in *Von Cleef* were limited to evidence and instrumentalities of the crimes being investigated and for which the arrests were made.

I join the grant of certiorari in this case but dissent from the summary reversal.

PRONER *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1022. Decided June 23, 1969.

Certiorari granted; 405 F. 2d 943, vacated and remanded.

Harris B. Steinberg for petitioner.

Solicitor General Griswold, Assistant Attorney General Walters, and *Joseph M. Howard* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Benton* v. *Maryland, ante,* p. 784.

ANDERSON ET AL. *v.* URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF PADUCAH, KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 1414. Decided June 23, 1969.

436 S. W. 2d 533, appeal dismissed and certiorari denied.

Michael Avedisian for appellants.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BYERS *v.* CITY OF OKLAHOMA CITY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 652, Misc. Decided June 23, 1969.

Certiorari granted; vacated and remanded.

Giles K. Ratcliffe for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *Williams* v. *Oklahoma City*, *ante*, p. 458.

WHITE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1259, Misc. Decided June 23, 1969.

Certiorari granted; 402 F. 2d 72, vacated and remanded.

Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg, and *Edward Fenig* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Benton* v. *Maryland*, *ante*, p. 784.

MOYA ET UX. *v.* DeBACA, DBA DeBACA & CO. CREDIT & COLLECTION AGENCY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

No. 996, Misc. Decided June 23, 1969.

286 F. Supp. 606, appeal dismissed.

William G. Fitzpatrick, Jr., for appellants.

Claud S. Mann for DeBaca et al., and *Boston E. Witt*, Attorney General, and *James V. Noble*, Assistant Attorney General, for the State of New Mexico, appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN would vacate the judgment and remand the case in light of *Sniadach* v. *Family Finance Corp. of Bay View*, *ante*, p. 337.

DILLARD *v.* FAMILY COURT, QUEENS COUNTY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 1939, Misc. Decided June 23, 1969.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

ROSADO ET AL. *v.* WYMAN, COMMISSIONER OF SOCIAL SERVICES FOR THE STATE OF NEW YORK, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1539. Decided June 23, 1969.*

No. 1539, certiorari before judgment denied; No. 1540, appeal dismissed.

Carl Rachlin, Martin Garbus, James Spitzer, and *Morton Friedman* for petitioners in No. 1539 and appellants in No. 1540.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Amy Juviler,* Assistant Attorney General, and *Philip Weinberg* for respondents in No. 1539 and appellees in No. 1540.

Morris H. Schneider and *Jack Goldberg* for Barbaro et al., and *Alan H. Levine, Eleanor Holmes Norton, Martin M. Berger,* and *Jerome Kretchmer* for the American Civil Liberties Union et al., as *amici curiae.*

PER CURIAM.

The motions of Joseph Barbaro et al. and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* are granted. The motion to expedite review is denied.

The application to vacate the stays granted by the

*Together with No. 1540, *Rosado et al.* v. *Wyman, Commissioner of Social Services for the State of New York, et al.,* on appeal from the United States District Court for the Eastern District of New York.

Court of Appeals on June 11, 1969, and June 19, 1969, of the injunctions of the District Court, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, is denied.

The petition for a writ of certiorari before judgment in No. 1539 is denied. The appeal in No. 1540 is dismissed for want of jurisdiction. *Mengelkoch* v. *Industrial Welfare Commission*, 393 U. S. 83 (1968); *Wilson* v. *Port Lavaca*, 391 U. S. 352 (1968).

MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

LINDSAY *v.* KELLEY, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 1370. Decided June 23, 1969.

433 Pa. 406, 250 A. 2d 474, appeal dismissed and certiorari denied.

James E. Beasley for appellant.

William C. Sennett, Attorney General of Pennsylvania, and *Edward Friedman* for appellee.

Bernard G. Segal, Samuel D. Slade, and *Ralph S. Snyder* for the Pennsylvania Bar Assn. as *amicus curiae* in support of the motion to dismiss.

PER CURIAM.

The motion of the Pennsylvania Bar Association for leave to file a brief as *amicus curiae* is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ATLAS ENGINE WORKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 598. Decided June 23, 1969.*

Certiorari granted; No. 598, 396 F. 2d 775; No. 906, 404 F. 2d 1097; No. 1213, 406 F. 2d 17; No. 1273, 404 F. 2d 105, vacated and remanded.

Robert B. Gosline for petitioner in No. 598. *Robert Lewis* for petitioner in No. 906. *Laurent K. Varnum* for petitioner in No. 1213. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for petitioner in No. 1273.

Solicitor General Griswold and *Messrs. Ordman, Manoli,* and *Come* for respondent in Nos. 598 and 906. *Solicitor General Griswold* and *Mr. Ordman* for respondent in No. 1213. *William J. Larkin 2d* for respondent in No. 1273.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated, and the cases are remanded to the respective United States Courts of Appeals with instructions to remand the cases to the National Labor Relations Board for further consideration in light of *NLRB* v. *Gissel Packing Co., Inc., ante,* p. 575.

*Together with No. 906, *Thrift Drug Co. of Pennsylvania* v. *National Labor Relations Board,* and No. 1213, *Lou De Young's Market Basket, Inc.* v. *National Labor Relations Board,* also on petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit; and No. 1273, *National Labor Relations Board* v. *Pembek Oil Corp.,* on petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

HOUSE *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1642, Misc. Decided June 23, 1969.

408 F. 2d 1008, appeal dismissed and certiorari denied.

Solicitor General Griswold, Assistant Attorney General Ruckelshaus, and *Alan S. Rosenthal* for the United States et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

TILLMAN ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1879, Misc. Decided June 23, 1969.

Certiorari granted as to petitioner Fox and denied as to all other petitioners; 406 F. 2d 930, vacated in part and remanded.

Howard Moore, Jr., for petitioners.

Solicitor General Griswold, Assistant Attorney General Wilson, and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari as to petitioner Fox are granted. The judgment is vacated in part and the case is remanded to the United States District Court for the Northern District of Georgia for further consideration in light of *Alderman* v. *United States,* 394 U. S. 165. MR. JUSTICE BLACK dissents. As to all other petitioners the petition for a writ of certiorari is denied.

Reporter's Note.

The next page is purposely numbered 901. The numbers between 830 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MAY 19 THROUGH JUNE 23, 1969.

MAY 19, 1969.

*Miscellaneous Orders.**

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE).

Pursuant to the opinion of this Court of March 3, 1969, 394 U. S. 11, it is ordered that Walter P. Armstrong, Jr., Esquire, of Memphis, Tennessee, be, and he is hereby, appointed as Special Master in this cause to make a preliminary determination consistent with the opinion of this Court. The Special Master shall have authority to fix the time and conditions of hearings which he may order, and is authorized to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses and a reasonable compensation for his services to be approved hereafter by the Court. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, and the cost of printing his report or reports shall be charged against and be borne by the parties in such proportion as the Court may hereafter approve.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.

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*For Court's order prescribing the Federal Rules of Procedure for United States Magistrates, see *post*, p. 990.

No. 598, Misc., October Term, 1964. WILLIAMSON ET AL. *v.* GILMER ET AL., 379 U. S. 955. Second motion to recall and amend order of January 18, 1965, and amended petition for writ of mandamus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. [For previous orders herein, see, *e. g.*, 386 U. S. 1015.]

No. —. MARCUCILLI *v.* UNITED STATES ET AL. C. A. 2d Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stay should be granted. *Samuel J. Landau* for applicant. *Solicitor General Griswold* in opposition.

No. 528. NACIREMA OPERATING CO., INC., ET AL. *v.* JOHNSON ET AL.; and

No. 663. TRAYNOR ET AL., DEPUTY COMMISSIONERS *v.* JOHNSON ET AL. C. A. 4th Cir. [Certiorari granted, 393 U. S. 976.] Cases restored to calendar for reargument.

No. 642. BOYKIN *v.* ALABAMA. Sup. Ct. Ala. [Certiorari granted, 393 U. S. 820.] Motion of Gerald H. Gottlieb et al. for leave to file a brief as *amici curiae* after argument granted to extent of filing the brief already submitted. *Gerald H. Gottlieb, pro se,* and *Earl Klein, pro se,* on the motion.

No. 1163. SMITH *v.* UNITED STATES. C. A. 5th Cir. Motion to defer consideration of petition for writ of certiorari granted. Reported below: 405 F. 2d 253.

No. 1216. ADJMI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion to defer consideration of petition for writ of certiorari granted. *Milton E. Grusmark* and *Natalie Baskin* on the motion. Reported below: 208 So. 2d 859.

Certiorari Granted. (See also No. 730, Misc., *ante*, p. 161.)

No. 712, Misc. MONKS *v.* NEW JERSEY. Sup. Ct. N. J. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *John G. Thevos* for respondent.

Certiorari Denied. (See also No. 1209, *ante*, p. 163; and No. 1230, *ante*, p. 161.)

No. 772. FRITZINGER *v.* WEIST ET AL. C. A. 3d Cir. Certiorari denied. *David Kanner* and *Edward N. Barol* for petitioner. *James M. Marsh* for respondent Millard. Reported below: 402 F. 2d 867.

No. 894. WEITZEN ET AL. *v.* HEIT ET AL. C. A. 2d Cir. Certiorari denied. *John F. Sonnett* for Grant et al., *Devereux Milburn* and *John F. X. Peloso* for Weitzen et al., *Boris Kostelanetz* for Belock Instrument Corp., and *Wilbur H. Hecht* for Lybrand, Ross Bros. & Montgomery, petitioners. *William E. Haudek, Arthur W. Lichtenstein,* and *Lawrence Milberg* for Heit et al., *Samuel R. Pierce, Jr.,* for Tyminski, and *Hyman Bravin* for Levy, respondents. *Solicitor General Griswold, Philip A. Loomis, Jr., David Ferber,* and *Donald M. Feuerstein* filed a memorandum for the United States, by invitation of the Court, 393 U. S. 1074, in opposition. Reported below: 402 F. 2d 909.

No. 1055. WILSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Anthony Savage, Jr.,* for petitioner. *James E. Kennedy* for respondent. Reported below: 74 Wash. 2d 243, 444 P. 2d 141.

No. 1194. FELD *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 185 Ct. Cl. 754.

No. 704. CITY OF PHILADELPHIA *v.* ATLANTIC REFINING CO. ET AL. C. A. 3d Cir. Certiorari denied. *John M. McNally, Jr.*, and *Levy Anderson* for petitioner. *James E. Beasley* for respondents Hennigan et al. Reported below: 400 F. 2d 857.

No. 1110. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* KROGER CO. ET AL.;

No. 1123. KROGER CO. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 1130. NATIONAL LABOR RELATIONS BOARD *v.* KROGER CO. ET AL. C. A. 6th Cir. Certiorari denied. *Lester Asher* and *Bernard Dunau* for Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, and *S. G. Lippman* and *Donald Grody* for Retail Clerks International Assn., AFL–CIO, petitioners in No. 1110 and intervenors below in No. 1123. *Nicholas Unkovic, J. Mack Swigert,* and *Norman Diamond* for petitioner in No. 1123, and for respondent Kroger Co. in Nos. 1110 and 1130; *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Peter Ames Eveleth* for petitioner in No. 1130; and *Messrs. Griswold* and *Ordman* for respondent in No. 1123. Reported below: 401 F. 2d 682.

No. 1114. GENERAL ELECTRIC CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO; and

No. 1208. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO *v.* GENERAL ELECTRIC CO. C. A. 2d Cir. Certiorari denied. *David L. Benetar* for petitioner in No. 1114 and for respondent in No. 1208. *Ruth Weyand* for petitioner in No. 1208 and for respondent in No. 1114. Reported below: 407 F. 2d 253.

No. 1143. NORRIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Dean E. Richards* and *James Manahan* for petitioner. *Theodore L. Sendak*, Attorney General of Indiana, and *Donald D. Doxsee* and *William F. Thompson*, Deputy Attorneys General, for respondent. Reported below: —— Ind. ——, 240 N. E. 2d 45.

No. 1190. BERGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Richard L. Levy* and *Solomon Fisher* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett* for respondent. Reported below: 404 F. 2d 668.

No. 1199. AURELI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Anna R. Lavin* for petitioner. Reported below: 99 Ill. App. 2d 349, 241 N. E. 2d 694.

No. 1200. HUMBLE OIL & REFINING CO. ET AL. *v.* AMERICAN OIL CO. ET AL. C. A. 8th Cir. Certiorari denied. *Arthur H. Dean, David W. Peck, Roy H. Steyer,* and *Walter R. Mayne* for petitioners. *Richmond C. Coburn* for respondents. Reported below: 405 F. 2d 803.

No. 1204. BENSON *v.* KIRKPATRICK, PROBATION OFFICER, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1212. BOARD OF TRUSTEES OF GALVESTON WHARVES ET AL. *v.* UNITED INDUSTRIAL WORKERS OF SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES & INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL–CIO. C. A. 5th Cir. Certiorari denied. *E. Barrett Prettyman, Jr.,* for petitioners. *Howard Schulman* for respondent. Reported below: 400 F. 2d 320.

No. 1206. STRANG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Edward Bennett Williams* and *Patrick M. Wall* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 405 F. 2d 971.

No. 1211. MACCORKLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles M. Love* and *John B. Fisher* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 407 F. 2d 497.

No. 1215. MANLEY ET AL. *v.* SCHOENBAUM. C. A. 2d Cir. Certiorari denied. *Marvin Schwartz* for Pradal et al., and *Whitney North Seymour, Jr.,* and *Anthony L. Fletcher* for Manley et al., petitioners. *Irving Malchman* for respondent. Reported below: 405 F. 2d 215.

No. 1217. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *B. Clarence Mayfield* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 405 F. 2d 874.

No. 1224. BROCK, TRUSTEE *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Irving M. Wolff* for petitioner. *Carl K. Hoffmann* for respondent. Reported below: 405 F. 2d 429 and 435.

No. 1225. SALT LAKE CITY FIRE FIGHTERS LOCAL 1645, AFL–CIO, ET AL. *v.* SALT LAKE CITY. Sup. Ct. Utah. Certiorari denied. *Adam M. Duncan* for petitioners. Reported below: 22 Utah 2d 115, 449 P. 2d 239.

No. 1221. BARNETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John F. Dugger* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 407 F. 2d 1114.

No. 1222. S. H. LYNCH & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Fritz L. Lyne* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 406 F. 2d 766.

No. 1226. GREENWOOD MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hardy Lott* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Leonard* for the United States. Reported below: 406 F. 2d 1086.

No. 1228. FENTRESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William J. Garber* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 405 F. 2d 501.

No. 1262. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *J. J. Wade, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 407 F. 2d 35.

No. 1269. DUGGER *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 5th Cir. Certiorari denied. *James Pope Simpson* for respondent. Reported below: 403 F. 2d 719.

No. 1229. FALLON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George C. Pontikes* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 407 F. 2d 621.

No. 1231. DELACRUZ *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 5th Cir. Certiorari denied. *L. N. D. Wells, Jr.,* and *Otto B. Mullinax* for petitioner. *Luther Hudson* for respondent. Reported below: 405 F. 2d 459.

No. 1234. KWAI CHIU YUEN ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for respondent. Reported below: 406 F. 2d 499, 773, and 774.

No. 1235. HUBBARD ET AL. *v.* KIEFEL. C. A. 7th Cir. Certiorari denied. *Peter Fitzpatrick* and *George Kaye* for Hubbard, and *Alvin G. Hubbard* for Las Vegas Hacienda, Inc., petitioners. *Lowell H. Jacobson* for respondent. Reported below: 404 F. 2d 1163.

No. 1236. STURTZ, TRUSTEE IN BANKRUPTCY *v.* NEW YORK WORLD'S FAIR 1964–1965 CORP. C. A. 2d Cir. Certiorari denied. *Robert P. Herzog* and *Jules Teitelbaum* for petitioner. *Ambrose Doskow* for respondent. Reported below: 405 F. 2d 309.

No. 1241. GAMBILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William H. McElwee* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 408 F. 2d 8.

No. 1248. GUILLORY *v.* LEVINGSTON SHIPBUILDING Co. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. *Wiley B. Thomas, Jr.*, for petitioner. *John D. Rienstra, Jr.*, for respondent. Reported below: 433 S. W. 2d 515.

No. 1249. RAINS *v.* NIAQUA, INC. C. A. 2d Cir. Certiorari denied. *Leon J. Greenspan* and *Joel Martin Aurnou* for petitioner. *Edwin T. Bean* for respondent. Reported below: 406 F. 2d 275.

No. 1252. STOREY ET AL. *v.* MAYO, CHAIRMAN, FLORIDA PUBLIC SERVICE COMMISSION, ET AL. Sup. Ct. Fla. Certiorari denied. *Irving Peskoe* for petitioners. *Larry S. Stewart* and *Vernon W. Turner* for respondent City of Homestead, and *Phillip Goldman* for respondent Florida Power & Light Co. Reported below: 217 So. 2d 304.

No. 1275. UNITED STATES *v.* KEATTS ET UX. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Taylor, Roger P. Marquis,* and *Raymond N. Zagone* for the United States. *Lewis S. Pope* for respondents. Reported below: 405 F. 2d 913.

No. 1277. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* CALLOWAY. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Charles W. Musgrove,* Assistant Attorney General, for petitioner. *J. Leonard Fleet* for respondent. Reported below: 409 F. 2d 59.

No. 1346. NATTA ET AL. *v.* ZLETZ ET AL. C. A. 7th Cir. Certiorari denied. *Edward S. Irons* for petitioners. *Hammond E. Chaffetz* for respondents. Reported below: See 405 F. 2d 99.

No. 1318. SANES *v.* ADAMS. Sup. Ct. Ill. Certiorari denied. *Sidney Z. Karasik* for petitioner. Reported below: 41 Ill. 2d 381, 243 N. E. 2d 233.

No. 1361. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* WYATT. Sup. Ct. Nev. Certiorari denied. *James F. Boccardo* for respondent. Reported below: 84 Nev. 662, 448 P. 2d 46.

No. 1091. LOCAL 342, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) ET AL. *v.* TRW, INC. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stephen I. Schlossberg, John A. Fillion, Jordan Rossen,* and *Bernard F. Ashe* for petitioners. *Owen J. Neighbours* for respondent. Reported below: 402 F. 2d 727.

No. 1113. TELEPHONE USERS ASSOCIATION, INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Motion to remand denied. Certiorari denied. *Arthur S. Curtis* for petitioner. *Charles T. Duncan* and *George F. Donnella* for Public Service Commission of the District of Columbia, and *Hugh B. Cox, Paul F. McArdle, Howard C. Anderson,* and *Robert A. Levetown* for Chesapeake & Potomac Telephone Co., respondents.

No. 1132. CALIFORNIA ET AL. *v.* GIANNINI ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE HARLAN is of the opinion that certiorari should be granted. *Thomas C. Lynch,* Attorney General of California, *Albert H. Harris, Jr.,* Assistant Attorney General, and *Michael J. Phelan,* Deputy Attorney General, for petitioners. *Kenneth Larson* for respondents. Reported below: 69 Cal. 2d 563, 446 P. 2d 535.

No. 1187. PERSICO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Maurice Edelbaum* for Persico, *Robert Kasanof* for Albanese, *Frances Thaddeus Wolff* for Spero, and *Edmund A. Rosner* for McIntosh, petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Charles Ruff* for the United States. Reported below: 406 F. 2d 192.

No. 1191. MORGAN *v.* NELSON ET AL. Sup. Ct. Miss. Motion to dispense with printing petition denied. Certiorari denied. *Albert Sidney Johnston, Jr.,* for petitioner. Reported below: 216 So. 2d 174.

No. 1205. OLSEN ET AL. *v.* SWARTZ ET AL. C. A. 6th Cir. Motion to dispense with printing petition denied. Certiorari denied.

No. 1367, Misc. KETCHMORE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *George A. Katz* and *Leon Polsky* for petitioner. *Eugene Gold* and *J. Mitchell Rosenberg* for respondent.

No. 1370, Misc. RUIP *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied. *John B. Breckinridge,* Attorney General of Kentucky, and *David D. Murrell* and *Holland N. McTyeire,* Assistant Attorneys General, for respondent. Reported below: 400 F. 2d 871.

No. 1625, Misc. GARDNER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Bernard Dunau* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 132 U. S. App. D. C. 331, 407 F. 2d 1266.

No. 1517, Misc. WOOD *v.* UNITED STATES; and

No. 1697, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Charles L. Kellar* for petitioner in each case. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States in No. 1517, Misc., and Messrs. *Griswold, Wilson, Fenig,* and *Jerome M. Feit* for the United States in No. 1697, Misc. Reported below: No. 1517, Misc., 405 F. 2d 423; No. 1697, Misc., 404 F. 2d 1069.

No. 1540, Misc. MASSEY *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. *Howard Moore, Jr.,* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Marion O. Gordon* and *Mathew Robins,* Assistant Attorneys General, and *Courtney Wilder Stanton,* Deputy Assistant Attorney General, for respondent. Reported below: 224 Ga. 721, 164 S. E. 2d 786.

No. 1561, Misc. POWELL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Jack Greenberg, Michael Meltsner, Anthony G. Amsterdam, Tobias Simon,* and *Thomas E. Sholts,* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for respondent. Reported below: 403 F. 2d 33.

No. 1575, Misc. BURROUGHS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1628, Misc. LONGMIRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John S. Tucker, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 404 F. 2d 326.

No. 1631, Misc. EPPS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States.

No. 1650, Misc. WADE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 266 Cal. App. 2d 918, 72 Cal. Rptr. 538.

No. 1666, Misc. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1667, Misc. SCHLETTE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1668, Misc. ESGATE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States. Reported below: 186 Ct. Cl. 207.

No. 1670, Misc. MOYE *v.* SIOUX CITY & NEW ORLEANS BARGE LINES, INC. C. A. 5th Cir. Certiorari denied. *Albert Sidney Johnston, Jr.,* for petitioner. *George B. Matthews* for respondent. Reported below: 402 F. 2d 238.

No. 1683, Misc. CULVER *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1686, Misc. ARCURI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 405 F. 2d 691.

No. 1676, Misc. McCLELLAND *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *Milton B. Allen* for petitioner. Reported below: 4 Md. App. 18, 240 A. 2d 769.

No. 1681, Misc. MANLEY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *LeRoy S. Zimmerman* for respondent. Reported below: 404 F. 2d 44.

No. 1684, Misc. SILVER *v.* DUNBAR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 407 F. 2d 1182.

No. 1705, Misc. OLDEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 69 Cal. 2d 845, 447 P. 2d 341.

No. 1706, Misc. STOKLEY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 266 Cal. App. 2d 930, 72 Cal. Rptr. 513.

No. 1712, Misc. CURRIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 405 F. 2d 1039.

No. 1717, Misc. FORST *v.* DELAWARE. Sup. Ct. Del. Certiorari denied.

No. 1719, Misc. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 405 F. 2d 857.

No. 1727, Misc. HANRAHAN *v.* JOHNSON ET AL. C. A. 7th Cir. Certiorari denied. *Martin J. Flynn* for respondents.

No. 1726, Misc. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: —— U. S. App. D. C. ——, 407 F. 2d 714.

No. 1732, Misc. BULLIS *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. *Melvin Schaengold* for petitioner.

No. 1736, Misc. BURGESS *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1738, Misc. LANDMAN *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1739, Misc. STUART ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett* for Commissioner of Internal Revenue, and *Wallace S. Myers* for Fagundes et al., respondents.

No. 1743, Misc. BELTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Phillip A. Hubbart* for petitioner. Reported below: 217 So. 2d 97.

No. 1749, Misc. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1748, Misc. MCELRATH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States.

No. 1745, Misc. Fox *v.* Dutton, Warden. C. A. 5th Cir. Certiorari denied. *Philip M. Carden* for petitioner. Reported below: 406 F. 2d 123.

No. 1751, Misc. Borum *v.* United States. C. A. D. C. Cir. Certiorari denied. *Howard C. Westwood* and *T. Rognald Dankmeyer, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 133 U. S. App. D. C. 147, 409 F. 2d 433.

No. 1752, Misc. Dumas *v.* California. C. A. 9th Cir. Certiorari denied.

No. 1756, Misc. Nelson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 1775, Misc. Justice *v.* United States. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 407 F. 2d 1323.

No. 1797, Misc. Gant *v.* Kropp, Warden. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent. Reported below: 407 F. 2d 776.

No. 1801, Misc. Hart *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 407 F. 2d 1087.

No. 1562, Misc. SERRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States.

No. 1639, Misc. WELTON *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to amend petition granted. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States.

Rehearing Denied.

No. 30. KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. *v.* PREISLER ET AL., 394 U. S. 526;

No. 86. AMP INC. *v.* COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., 393 U. S. 825;

No. 173. GORMAN *v.* UNITED STATES, 393 U. S. 832;

No. 453. GREGG *v.* UNITED STATES, 394 U. S. 489;

No. 814. DUVERNAY *v.* UNITED STATES, 394 U. S. 309;

No. 844. STEPHAN ET UX. *v.* STATE TAX COMMISSIONER OF DELAWARE, 394 U. S. 573;

No. 1041. KAUFER *v.* UNITED STATES, 394 U. S. 458;

No. 1066. ROSEN ET AL. *v.* EASTERN AIRLINES, INC., 394 U. S. 959;

No. 662, Misc. JONES *v.* UNITED STATES, 393 U. S. 1057;

No. 804, Misc. SCHUTZ *v.* UNITED STATES, 394 U. S. 946;

No. 1262, Misc. MUTTER *v.* UNITED STATES, 394 U. S. 947;

No. 1275, Misc. MILLER *v.* THORN, EXECUTRIX, 393 U. S. 1122; and

No. 1593, Misc. ADAMS *v.* BRENNER, COMMISSIONER OF PATENTS, 394 U. S. 965. Petitions for rehearing denied.

No. 1031. MORSE *v.* HINDMAN ET AL., 394 U. S. 943;
No. 1081. MORSE *v.* HINDMAN ET AL., 394 U. S. 943;
No. 1437, Misc. ADAMS *v.* CAMERON, HOSPITAL SUPERINTENDENT, 394 U. S. 948; and
No. 1466, Misc. DICKERSON *v.* LEE, 394 U. S. 949. Motions for leave to file petitions for rehearing denied.

MAY 26, 1969.

Miscellaneous Orders.

No. —. ROBINSON *v.* CALIFORNIA. Sup. Ct. Cal. Application for stay of execution presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, granted pending timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for writ of certiorari is granted, this stay is to continue pending issuance of the mandate of this Court.

No. 477. UNITED STATES *v.* UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674 (ANGELINI, CLAIMANT). C. A. 7th Cir. [Certiorari granted, 393 U. S. 949.] Case restored to calendar for reargument.

No. 622. MAXWELL *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. [Certiorari granted, 393 U. S. 997.] Case restored to calendar and set for reargument on October 13, 1969.

No. 1421. JACKMAN ET AL. *v.* BODINE ET AL. Sup. Ct. N. J. Application for a stay of the primary election of June 3, 1969, and other relief denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Lawrence I. Lerner* for petitioners Scrimmager et al. on the motion.

No. 1070. BALISTRIERI *v.* UNITED STATES, 394 U. S. 985. The Solicitor General is requested to file a response to petition for rehearing. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 1127. TECHNITROL, INC. *v.* MCMANUS, U. S. DISTRICT JUDGE, 394 U. S. 997. Motion of Collins Radio Co., defendant below, for damages under Rule 56 denied. *Morris Relson* on the motion. *Laurence B. Dodds* for Technitrol, Inc., in opposition.

No. 1276. ROBERTS *v.* MCDONALD ET AL. C. A. D. C. Cir. Motion of petitioner pursuant to 28 U. S. C. § 455 suggesting disqualification of MR. JUSTICE BRENNAN denied. *William H. Roberts, pro se,* on the motion.

No. 1893, Misc. MERRILL *v.* MOSELEY, WARDEN;
No. 1924, Misc. MCDOWELL *v.* MOSELEY, WARDEN;
No. 1928, Misc. WEBSTER *v.* HOWARD, REFORMATORY SUPERINTENDENT;
No. 1930, Misc. SMILEY *v.* CALIFORNIA ET AL.; and
No. 1976, Misc. ALLEN *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1779, Misc. YOUNG *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Certiorari Denied. (See also No. 1245, *ante,* p. 211; No. 1257, *ante,* p. 211; and No. 1284, *ante,* p. 212.)

No. 1207. BURKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Delos R. Johnson, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 400 F. 2d 866.

No. 1185. PAGNANI *v.* SECURITIES AND EXCHANGE COMMISSION;

No. 1186. MATUSOW *v.* SECURITIES AND EXCHANGE COMMISSION; and

No. 1195. GREAT AMERICAN INDUSTRIES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. *Robert D. Larsen* for petitioner in No. 1185; *Robert Kasanof* for petitioner in No. 1186; and *Simon H. Rifkind, Gerald D. Stern,* and *Thomas R. Farrell* for petitioners in No. 1195. *Solicitor General Griswold, Philip A. Loomis, Jr., Walter P. North,* and *Meyer Eisenberg* for respondent in all three cases. Reported below: 407 F. 2d 453.

No. 1237. ROSS ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Julius Lucius Echeles* for petitioner Ross. Reported below: 41 Ill. 2d 445, 244 N. E. 2d 608.

No. 1239. YOUNG & CO. ET AL. *v.* SHEA, DEPUTY COMMISSIONER OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. *E. D. Vickery* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander,* and *Ralph A. Fine* for respondent Shea, and *W. Jiles Roberts* for respondent Tugwell. Reported below: 397 F. 2d 185, and 404 F. 2d 1059.

No. 1242. NEBENZAL *v.* RE [NOW SUTTON] ET AL. C. A. D. C. Cir. Certiorari denied. *Henry J. Clay, Franklin P. Gould,* and *Pieter J. Kooiman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for respondents. Reported below: —— U. S. App. D. C. ——, 407 F. 2d 717.

No. 1255. COOK ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Julius Lucius Echeles* and *Joseph A. Varon* for petitioners.

No. 1247. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Louis Sherman, Thomas X. Dunn,* and *Seymour Sacks* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 405 F. 2d 159.

No. 1250. BALLAS ET AL. *v.* CLADIS ET AL. Sup. Ct. Colo. Certiorari denied. *Herbert M. Boyle* for petitioners. *Warren O. Martin* for respondents Cladis et al. Reported below: —— Colo. ——, 447 P. 2d 224.

No. 1254. STRACHAN SHIPPING CO. ET AL. *v.* SHEA, DEPUTY COMMISSIONER OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. *Sweeney J. Doehring* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander,* and *Ralph A. Fine* for respondent Shea, and *W. Jiles Roberts* for respondent Nehring. Reported below: 406 F. 2d 521.

No. 1259. SICA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *F. Filmore Jaffe* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1261. CONSTRUCTION AGGREGATES CORP. *v.* HEWITT-ROBINS, INC. C. A. 7th Cir. Certiorari denied. *Harlan L. Hackbert* for petitioner. *George B. Christensen* for respondent. Reported below: 404 F. 2d 505.

No. 1374. SEMET-SOLVAY DIVISION, ALLIED CHEMICAL CORP. *v.* MILLER. C. A. 4th Cir. Certiorari denied. *John E. Jenkins, Jr.,* for petitioner. Reported below: 406 F. 2d 1037.

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No. 1260. PEPPERELL MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Frank A. Constangy* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 403 F. 2d 520.

No. 1263. JAPAN LINE, LTD., ET AL. *v.* SABRE SHIPPING CORP. C. A. 2d Cir. Certiorari denied. *Philip A. Ryan* for Japan Line, Ltd., et al., and *A. Vernon Carnahan* for Maritime Co. of the Philippines, petitioners. *Leon Silverman* for respondent. Reported below: 407 F. 2d 173.

No. 1265. ALPHA-CONTINENTAL ET AL. *v.* UNITED STATES FOR THE USE OF F. E. ROBINSON CO. OF N. C., INC., ET AL. C. A. 4th Cir. Certiorari denied. *R. M. Ginsberg* and *Jack D. Eades* for petitioners. *John H. Anderson* for respondents. Reported below: 404 F. 2d 343, 406 F. 2d 561.

No. 1287. RICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Barry L. Garber* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 407 F. 2d 934.

No. 1288. MCLANEY *v.* TIME, INC., DBA "LIFE." C. A. 5th Cir. Certiorari denied. *J. B. Spence* for petitioner. *Harold R. Medina, William S. Frates,* and *Larry S. Stewart* for respondent. Reported below: 406 F. 2d 565.

No. 1181. HOCHENEDEL *v.* LOUISIANA. Sup. Ct. La. Motion to dispense with printing petition granted. Certiorari denied.

No. 1189. YEAGER, PRINCIPAL KEEPER, ET AL. *v.* O'CONNOR. C. A. 3d Cir. Motion of respondent for leave to proceed herein *in forma pauperis* granted. Certiorari denied. *Abel Goldstein* for petitioners. Reported below: 405 F. 2d 632.

No. 1253. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Roberts H. Brown* and *Knox M. McMillan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 409 F. 2d 604.

No. 1267. NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, INC. *v.* DETROIT NEWSPAPER PUBLISHERS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *David Previant* and *David L. Uelmen* for petitioner. *Philip T. Van Zile II* and *Daniel J. Tindall, Jr.,* for Detroit Newspaper Publishers Assn., and *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for National Labor Relations Board, respondents. Reported below: 404 F. 2d 1159.

No. 564, Misc. IN RE WOODY. C. A. 9th Cir. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Thomas M. Tuggle,* Assistant Attorney General, in opposition.

No. 1248, Misc. DIPAOLO *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. Reported below: 399 F. 2d 72.

No. 1244, Misc. MULLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Leonard H. Dickstein* for the United States. Reported below: 401 F. 2d 591.

No. 1319, Misc. HORTON *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondent.

No. 1354, Misc. TOWNES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *Waller H. Horsley* and *Robert L. Dolbeare* for petitioner. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 1424, Misc. BARBEE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Charles Morgan, Jr., Reber F. Boult, Jr., Melvin L. Wulf, Eleanor Holmes Norton,* and *Martin Garbus* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 432 S. W. 2d 78.

No. 1454, Misc. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 1470, Misc. SIMMONS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Mark D. Larner* for petitioner. Reported below: 52 N. J. 538, 247 A. 2d 313.

No. 1441, Misc. IN RE RUDISILL. Sup. Ct. Colo. Certiorari denied. *Duke W. Dunbar*, Attorney General of Colorado, *John P. Moore*, Deputy Attorney General, and *Michael T. Haley*, Assistant Attorney General, in opposition. Reported below: —— Colo. ——, 453 P. 2d 598.

No. 1630, Misc. GARDNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1691, Misc. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *C. Frank Reifsnyder* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Jerome M. Feit* for the United States.

No. 1716, Misc. OLIVA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 183 Neb. 620, 163 N. W. 2d 112.

No. 1731, Misc. YATES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Jesse R. Fillman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Jerome M. Feit* for the United States. Reported below: 404 F. 2d 462, and 407 F. 2d 50.

No. 1733, Misc. DONOHUE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1735, Misc. SCOTT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Crawford C. Martin*, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *Hawthorne Phillips*, Executive Assistant Attorney General, *Robert C. Flowers* and *Lonny F. Zwiener*, Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 434 S. W. 2d 678.

No. 1747, Misc. MILLER ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1757, Misc. HUGGINS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Richard Steel* for petitioner. *Frank S. Hogan* for respondent.

No. 1760, Misc. PENDERGRAST *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Milton A. Kallis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: — U. S. App. D. C. —, — F. 2d —.

No. 1761, Misc. HOLLICK *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1764, Misc. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Terence F. MacCarthy* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 406 F. 2d 64.

No. 1765, Misc. DELEVAY *v.* REYNOLDS, ACTING COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1766, Misc. SCHNITZLER *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 406 F. 2d 319.

No. 1774, Misc. PING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Dan Johnston* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 407 F. 2d 157.

No. 1767, Misc. WILLIAMS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *Arlen D. Nickowitz* for respondent. Reported below: 157 Conn. 114, 249 A. 2d 245.

No. 1769, Misc. GOFF *v.* VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1770, Misc. SILVER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1776, Misc. HAMMER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 213 So. 2d 619.

No. 1777, Misc. WATSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1782, Misc. WEAVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *George W. Shadoan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 133 U. S. App. D. C. 66, 408 F. 2d 1269.

No. 1783, Misc. WILLIAMS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1794, Misc. LEE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion*, Attorney General of Alabama, and *W. Mark Anderson III*, Special Assistant Attorney General, for respondent. Reported below: 406 F. 2d 466.

No. 1787, Misc. CHARLAND *v.* NORGE DIVISION, BORG-WARNER CORP., ET AL. C. A. 6th Cir. Certiorari denied. *Robert W. Murphy* for respondent Norge Division, Borg-Warner Corp. Reported below: 407 F. 2d 1062.

No. 1778, Misc. ANGLIN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 1784, Misc. RUSSELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 1791, Misc. LACAZE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 252 La. 971, 215 So. 2d 511.

No. 1793, Misc. BRIGHT *v.* PATE, WARDEN. Cir. Ct., Cook County, Ill. Certiorari denied.

No. 1795, Misc. BERNSTEIN *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 30 App. Div. 2d 1028, 294 N. Y. S. 2d 307.

No. 1803, Misc. PURVIS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *Joseph D. Harbaugh* for petitioner. *David B. Salzman* for respondent. Reported below: 157 Conn. 198, 251 A. 2d 178.

No. 1798, Misc. GAYLORD ET AL. *v.* SERAPHIM, JUDGE, ET AL. Sup. Ct. Wis. Certiorari denied.

No. 1841, Misc. BUCHANON *v.* MICHIGAN. Cir. Ct., Ingham County, Mich. Certiorari denied. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Stewart H. Freeman*, Assistant Attorney General, for respondent.

No. 1805, Misc. WILLIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1804, Misc. GIVENS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Gary D. Gortmaker* and *Albin W. Norblad* for respondent. Reported below: — Ore. —, 449 P. 2d 151.

No. 1806, Misc. SCOTT *v.* PROCUNIER, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied.

No. 1807, Misc. STARTTI *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 405 F. 2d 858.

No. 1808, Misc. SMILEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 1810, Misc. HOLGUIN *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1811, Misc. RUSSEL *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1812, Misc. RIVERA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 1814, Misc. NOOR *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1815, Misc. HAYKEL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1834, Misc. VANDERBURG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1915, Misc. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1840, Misc. HOWINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1882, Misc. DIMOND *v.* SUFFOLK COUNTY BAR ASSN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Emmett F. McNamara* for respondent.

No. 487, Misc. KNIGHT, AKA BRUNT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 395 F. 2d 971.

No. 663, Misc. HOAPILI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Donald S. Nishimura* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 395 F. 2d 656.

Rehearing Denied.

No. 954. CINO *v.* UNITED STATES, 394 U. S. 917;

No. 1061. TEAGUE ET AL. *v.* REGIONAL COMMISSIONER OF CUSTOMS, REGION II, ET AL., 394 U. S. 977;

No. 1093. BEST MEDIUM PUBLISHING CO., INC. *v.* VARNISH, 394 U. S. 987;

No. 964, Misc. EDWARDS *v.* KANSAS, 394 U. S. 989;

No. 1581, Misc. FIELDS *v.* MANCUSI, WARDEN, 394 U. S. 992; and

No. 1746, Misc. AKERS *v.* CASSIN, JUDGE, 394 U. S. 996. Petitions for rehearing denied.

No. 12. DESIST ET AL. *v.* UNITED STATES, 394 U. S. 244; and

No. 732, Misc. RICH *v.* UNITED STATES, 394 U. S. 993. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

Assignment Order.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that MR. JUSTICE BRENNAN be, and he is hereby, temporarily assigned to the First Circuit as Circuit Justice.

MAY 27, 1969.

Dismissal Under Rule 60.

No. 1674, Misc. FEAR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

JUNE 2, 1969.

Miscellaneous Orders.

No. 1101. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN *v.* ELGIN, JOLIET & EASTERN RAILWAY CO. C. A. 7th Cir. Joint motion to defer consideration of petition for certiorari granted. *Alex Elson* for petitioner and *Harlan L. Hackbert* for respondent on the motion. Reported below: 404 F. 2d 80.

No. 1843, Misc. LIFSCHUTZ *v.* ARABIAN ET AL. D. C. N. D. Cal. Motions of California State Psychological Assn. and American Psychiatric Assn. for leave to file briefs as *amici curiae* granted. Motion for leave to file petition for writ of mandamus and/or certiorari denied. *Kurt W. Melchior* for petitioner. *Warren E. Magee* for American Psychiatric Assn., in support of the petitioner.

No. 1809, Misc. BAGBY *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS. Motion for leave to file petition for writ of habeas corpus denied.

No. 1852, Misc. O'MEARA *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 1875, Misc. BALDWIN *v.* NEW YORK. Appeal from Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *William E. Hellerstein* and *Leon B. Polsky* for appellant. *Frank S. Hogan* and *Michael R. Juviler* for appellee. Reported below: 24 N. Y. 2d 207, 247 N. E. 2d 260.

Certiorari Granted.

No. 1291. UNITED STATES *v.* KORDEL ET AL. C. A. 6th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Lawrence G. Wallace, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. *Milton A. Bass* and *Solomon H. Friend* for respondents. Reported below: 407 F. 2d 570.

No. 766, Misc. MINOR *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case transferred to appellate docket. *Leon B. Polsky* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 398 F. 2d 511.

No. 1387, Misc. TURNER *v.* UNITED STATES. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case transferred to appellate docket and set for argument immediately following No. 766, Misc., *supra*. Reported below: 404 F. 2d 782.

Certiorari Denied. (See also No. 1268, *ante*, p. 335; and No. 1335, *ante*, p. 336.)

No. 1063. WRIGHT ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam* for petitioners. *William J. Scott*, Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel*, Assistant Attorneys General, for respondent. Reported below: 41 Ill. 2d 170, 242 N. E. 2d 180.

No. 1075. KNIGHT *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS. Sup. Ct. La. Certiorari denied. *Benjamin E. Smith* for petitioner. *Richard C. Baldwin* for respondent. Reported below: 252 La. 889, 214 So. 2d 716.

No. 1162. DANICA ENTERPRISES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *William T. Coleman, Jr.*, *Milton Young*, *Stephen S. Ziegler*, and *Richard L. Levy* for petitioner. *Solicitor General Griswold*, *Assistant Attorney General Walters*, *Harry Baum*, and *Louis M. Kauder* for respondent. Reported below: —— F. 2d ——.

No. 1201. HAYDEN, DBA HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE *v.* BOWEN ET AL. C. A. 5th Cir. Certiorari denied. *Raymond M. Hill* for petitioner. *Chris Dixie* for respondents. Reported below: 404 F. 2d 682.

No. 1238. BATTERTON, EXECUTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hershel Shanks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Jonathan S. Cohen* for the United States. Reported below: 406 F. 2d 247 and 250.

No. 1256. HILL *v.* FLOTA MERCANTE GRANCOLOMBIANA, S. A. C. A. 5th Cir. Certiorari denied. *Clifton S. Carl* for petitioner. Reported below: 405 F. 2d 878.

No. 1264. WOLFE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *George F. Douglas, Jr.,* for petitioner. Reported below: 433 Pa. 141, 249 A. 2d 316.

No. 1270. MCCOWN *v.* HUMBLE OIL & REFINING CO. C. A. 4th Cir. Certiorari denied. *Harvey Goldstein* for petitioner. *John W. Winston* for respondent. Reported below: 405 F. 2d 596.

No. 1272. SHEAFFER ET AL. *v.* WAREHOUSE EMPLOYEES UNION, LOCAL 730, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. D. C. Cir. Certiorari denied. *Albert J. Ahern, Jr.,* and *John K. Pickens* for petitioners. *Herbert S. Thatcher* for respondent. Reported below: 132 U. S. App. D. C. 401, 408 F. 2d 204.

No. 1274. SMITH *v.* STOUTOMIRE. Sup. Ct. Ala. Certiorari denied. *Charles S. Conley* for petitioner. Reported below: 283 Ala. 376, 217 So. 2d 242.

No. 1278. ARMSTRONG *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for the United States. Reported below: 186 Ct. Cl. 539, 405 F. 2d 1275.

No. 1280. FEIN *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied. *Milton C. Weisman* and *O. John Rogge* for petitioner. *Frank S. Hogan, Michael R. Juviler,* and *Eric A. Seiff* for respondent. Reported below: 410 F. 2d 13.

No. 1285. DETROIT VITAL FOODS, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 407 F. 2d 570.

No. 1289. MORIN ET UX. *v.* GARRA ET AL. Super. Ct. N. J. Certiorari denied. *Jacob L. Balk* and *Norman Dorsen* for petitioners. *Frederick B. Lacey* and *Walter E. Monaghan* for respondents.

No. 1296. AMERICAN SMELTING & REFINING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Joseph S. Jenckes, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 406 F. 2d 552.

No. 1300. BOND TRANSPORTATION, INC. *v.* COX ET AL. Sup. Ct. N. J. Certiorari denied. *Carroll A. Morley* for petitioner. *Vincent C. DeMaio* for respondent Cox. Reported below: 53 N. J. 186, 249 A. 2d 579.

No. 1308. EDWARD DON & CO. ET AL. *v.* UFLAND ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Sidney R. Zatz, J. Herzl Segal,* and *Philip B. Kurland* for petitioners. *Albert E. Jenner, Jr.,* and *Thomas P. Sullivan* for respondents. Reported below: 98 Ill. App. 2d 49, 240 N. E. 2d 725.

No. 1301. SNYDER *v.* JOURNAL PUBLISHING CO. ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Burton Young* for petitioner. *William C. Steel* for respondents. Reported below: 214 So. 2d 90.

No. 660. IN RE DENNETT. C. A. 10th Cir. Motion for leave to file reprinted petition with amendments granted. Certiorari denied. *J. Thomas Greene* and *John H. Allen* for respondent Beneficial Life Insurance Co., and *Randon W. Wilson* for respondent Walker Bank & Trust Co., in opposition.

No. 1266. DLUTZ *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Motion to dispense with printing petition and certiorari denied. Reported below: 406 F. 2d 227.

No. 1279. UNITED STATES *v.* IDEAL BASIC INDUSTRIES, INC. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE HARLAN are of the opinion that certiorari should be granted. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Walters, Harris Weinstein,* and *Grant W. Wiprud* for the United States. *Harry R. Horrow* and *Stephen J. Martin* for respondent. Reported below: 404 F. 2d 122.

No. 1015, Misc. NEGRON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *George J. Aspland* and *David F. Jordan* for respondent.

No. 1069, Misc. GETER *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for respondent.

No. 1295. ALLEGHANY CORP. ET AL. *v.* MISSOURI PACIFIC RAILROAD CO. ET AL.;

No. 1328. LEVIN ET AL. *v.* MISSOURI PACIFIC RAILROAD CO.; and

No. 1333. SLAYTON ET AL. *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Breck P. McAllister, G. Carroll Stribling,* and *Ben Vinar* for petitioners in No. 1295; *Maxwell Brandwen* and *John Lowenthal* for petitioners in No. 1328; and *William E. Haudek* and *Harold C. Ackert* for petitioners in No. 1333. *Albert E. Jenner, Jr.,* and *Philip W. Tone* for respondent Missouri Pacific Railroad Co. in all three cases. Reported below: 407 F. 2d 1078.

No. 959, Misc. RIVERA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Eugene Gold* and *Stanley M. Meyer* for respondent.

No. 1172, Misc. RUPPERT *v.* LAVALLEE, WARDEN. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Eleanor Jackson Piel* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Calvin M. Berger,* Assistant Attorney General, for respondent.

No. 1348, Misc. COLLINS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Frederick R. Millar, Jr.,* Deputy Attorney General, for respondent.

No. 1658, Misc. JOHNSON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *Mitchell A. Kramer* and *David C. Harrison* for petitioner. Reported below: 404 F. 2d 42.

No. 1513, Misc. GRINDSTAFF *v.* IOWA. C. A. 8th Cir. Certiorari denied.

No. 1587, Misc. PETERSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 405 F. 2d 102.

No. 1597, Misc. WOODARD *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Richard Newman* for petitioner. Reported below: 53 N. J. 64, 247 A. 2d 887.

No. 1693, Misc. LOWRY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1696, Misc. STAPLES *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1714, Misc. RUDERER *v.* SCHILTZ ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1715, Misc. RUDERER *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1740, Misc. ESPERTI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 406 F. 2d 148.

No. 1759, Misc. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein* for respondent.

No. 1802, Misc. YAGER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 436 S. W. 2d 527.

No. 1818, Misc. FINGAR *v.* UNITED STATES RAILROAD RETIREMENT BOARD. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 402 F. 2d 544.

No. 1819, Misc. TILLMAN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 1823, Misc. SHAFFNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: —— F. 2d ——.

No. 1826, Misc. TEZAK ET AL. *v.* SERAPHIM, JUDGE, ET AL. Sup. Ct. Wis. Certiorari denied.

No. 1827, Misc. BROWN ET AL. *v.* BETHANIA HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied.

No. 1830, Misc. HAINES *v.* LYNCH ET AL. C. A. 7th Cir. Certiorari denied.

No. 1836, Misc. MASSEN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 41 Wis. 2d 245, 163 N. W. 2d 616.

No. 1837, Misc. ALBANESE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William E. Hellerstein* and *Helaine Barnett* for petitioner. *Thomas J. Mackell* and *Peter J. O'Connor* for respondent.

No. 1844, Misc. BLYDEN *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1847, Misc. BORK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 4 Md. App. 404, 243 A. 2d 647.

No. 1848, Misc. SEARLES *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: —— Minn. ——, 165 N. W. 2d 552.

No. 1851, Misc. LISCIANDRELLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1854, Misc. LOWRIE *v.* SIGLER. C. A. 8th Cir. Certiorari denied. Reported below: 404 F. 2d 659.

No. 1856, Misc. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 268 Cal. App. 2d 23, 73 Cal. Rptr. 653.

No. 1861, Misc. HUGHES *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. *W. Edward Morgan* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 8 Ariz. App. 366, 446 P. 2d 472.

No. 1862, Misc. DOWNIE *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. *John H. Wessel* for petitioner. Reported below: 408 F. 2d 343.

No. 1864, Misc. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1891, Misc. STEIGLER *v.* DELAWARE. Super. Ct. Del., New Castle County. Certiorari denied. *William E. Taylor, Jr.,* for petitioner.

No. 1878, Misc. FORESTEL, ADMINISTRATRIX *v.* PENN NAVIGATION CO. ET AL. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* for petitioner. *Leon Sarpy* for respondents. Reported below: 404 F. 2d 1386.

Rehearing Denied.

No. 578, October Term, 1963. D'ERCOLE *v.* UNITED STATES, 375 U. S. 967. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 1644, Misc. SHOCK *v.* TESTER ET AL., 394 U. S. 1020. Petition for rehearing and motion for stay denied.

No. 1283, Misc., October Term, 1967. KORDIC ET UX. *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, 392 U. S. 935;

No. 280. UNITED STATES *v.* SKELLY OIL CO., 394 U. S. 678;

No. 834. PENDERGRAFT *v.* MISSISSIPPI, 394 U. S. 715;

No. 1122. FUND OF FUNDS, LTD. *v.* ROTH, 394 U. S. 975;

No. 1511, Misc. CINNAMON *v.* EATON, SHERIFF, 394 U. S. 964;

No. 1522, Misc. WINKLE *v.* KROPP, WARDEN, 394 U. S. 1003;

No. 1531, Misc. DELORME ET AL. *v.* UNITED STATES, 394 U. S. 991;

No. 1545, Misc. MCKINNEY *v.* BOYLE ET AL., 394 U. S. 992;

No. 1565, Misc. MCCONNELL *v.* WASHINGTON ET AL., 394 U. S. 1004; and

No. 1568, Misc. PARKER *v.* UNITED STATES, 394 U. S. 1004. Petitions for rehearing denied.

No. 1112. LEIGHTON *v.* ONE WILLIAM STREET FUND, INC., ET AL., 394 U. S. 988. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1369, October Term, 1967. SONDEREGGER *v.* HEISS, 392 U. S. 931, 393 U. S. 903. Motion for leave to file second petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

JUNE 9, 1969.

Miscellaneous Orders.

No. 1275, October Term, 1967. BUTTERMAN ET UX. *v.* WALSTON & CO., INC., ET AL., 391 U. S. 913. Petition to reopen and other relief denied.

No. —. IN RE SKOLNICK; and
No. —. IN RE ALBRIGHT. C. A. 7th Cir. Petitions to conduct investigations and other relief denied.

No. —. MANUEL *v.* ILLINOIS. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Elmer C. Kissane* in opposition.

No. 1406. MONKS *v.* NEW JERSEY. Sup. Ct. N. J. [Certiorari granted, *ante*, p. 903.] Motion of petitioner for the appointment of counsel granted. It is ordered that *Anthony G. Amsterdam, Esquire*, of Philadelphia, Pennsylvania, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 2096, Misc. STRAUSS *v.* SMITH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *Solicitor General Griswold* in opposition.

No. 2013, Misc. McLEAN *v.* CICCONE. Motion for leave to file petition for writ of injunction denied.

Certiorari Granted. (See No. 838, *ante*, p. 461; No. 966, Misc., *ante*, p. 462; and No. 1048, Misc., *ante*, p. 463.)

Certiorari Denied.

No. 1140. KENNEY *v.* HAUGH, WARDEN. Sup. Ct. Iowa. Certiorari denied. *Dan L. Johnston* for petitioner. *Richard C. Turner*, Attorney General of Iowa, and *David A. Elderkin* and *William A. Claerhout*, Assistant Attorneys General, for respondent. Reported below: — Iowa —, 163 N. W. 2d 428.

No. 1244. RADIO CORPORATION OF AMERICA *v.* SCM CORP. C. A. 2d Cir. Certiorari denied. *John F. Sonnett* for petitioner. *Frank F. Scheck* and *Jerry Oppenheim* for respondent. Reported below: 407 F. 2d 166.

No. 1258. DOSEK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Edwin F. Dosek* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg*, and *Roger A. Pauley* for the United States. Reported below: 405 F. 2d 405.

No. 1271. DOLLERIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Lee S. Jones* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard*, and *John P. Burke* for the United States. Reported below: 408 F. 2d 918.

No. 1282. WELCH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *F. Lee Bailey* for petitioner. *Lee C. Falke* for respondent.

No. 1281. MISSISSIPPI VALLEY PORTLAND CEMENT CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles Clark* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Thomas L. Stapleton,* and *Howard M. Koff* for the United States. Reported below: 408 F. 2d 827.

No. 1298. JOHN J. MCMULLEN ASSOCIATES, INC. *v.* STATE BOARD OF HIGHER EDUCATION ET AL. C. A. 9th Cir. Certiorari denied. *Martin Fleit, Harvey B. Jacobson, Jr.,* and *Erskine B. Wood* for petitioner. *Stephen W. Blore* and *Robert Y. Thornton* for respondents. Reported below: 406 F. 2d 497.

No. 1299. HOERDT, TRUSTEE, ET AL. *v.* CITY OF EVANSTON. App. Ct. Ill., 1st Dist. Certiorari denied. *Edward J. Metzdorf* for petitioners. Reported below: 99 Ill. App. 2d 307, 241 N. E. 2d 685.

No. 1302. UNION PACIFIC RAILROAD CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Robert J. Casey, Thomas E. Tyre, John A. Craig,* and *Thomas J. McCoy, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Gilbert E. Andrews* for the United States. Reported below: 185 Ct. Cl. 393, 401 F. 2d 778.

No. 1304. GEAUGA PLASTICS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *C. A. Kothe* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 404 F. 2d 1382.

No. 1316. BUSHMAN *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Barbara. Certiorari denied. *John M. Sink* for petitioner.

No. 1292. DAVIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1305. GOOCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert B. Thompson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 409 F. 2d 698.

No. 1312. ACTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jay Dushof* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Jacques B. Gelin* for the United States. Reported below: 401 F. 2d 896.

No. 1313. FRECCIA, AKA BANKS, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States.

No. 1315. GRIFFITH ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Louis R. Baker* for petitioners. Reported below: 267 Cal. App. 2d 837, 73 Cal. Rptr. 773.

No. 1317. POMONA VALLEY CENTER, INC., ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Louis R. Baker* for petitioners.

No. 1321. POMONA VALLEY CENTER, INC., ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Louis R. Baker* for petitioners.

No. 1330. CLARK, ADMINISTRATOR *v.* ATER ET AL. Sup. Ct. App. W. Va. Certiorari denied. *Harry Alan Sherman* for petitioner.

No. 1324. MENK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William C. Erbecker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 406 F. 2d 124.

No. 1326. ST. JAMES TEMPLE OF THE A. O. H. CHURCH OF GOD, INC., ET AL. *v.* BOARD OF APPEALS OF THE CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *John P. Madigan* for petitioners. *Raymond F. Simon, Marvin E. Aspen,* and *Howard G. Goldman* for respondents. Reported below: 100 Ill. App. 2d 302, 241 N. E. 2d 525.

No. 1334. GOLTEN MARINE CO., INC. *v.* TRELLEBORGS ANGFARTYGS A/B ET AL. C. A. 2d Cir. Certiorari denied. *Sidney A. Schwartz* for petitioner. *William P. Kain, Jr., Francis X. Byrn,* and *Joseph V. Fleming* for respondent Trelleborgs Angfartygs A/B. Reported below: 408 F. 2d 1334.

No. 1343. WILKINSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *George E. Tyack* for petitioner. Reported below: 17 Ohio St. 2d 9, 244 N. E. 2d 480.

No. 1347. STANLEY-ARTEX WINDOWS, DIVISION OF STANLEY WORKS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Glenn L. Greene, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 130 U. S. App. D. C. 369, 401 F. 2d 434.

No. 1773, Misc. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 407 F. 2d 597.

No. 1352. NORMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Charles J. McDonough* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for respondent. Reported below: 407 F. 2d 1337.

No. 1297. RILEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *Sidney Balick* for petitioner. Reported below: — Del. —, 249 A. 2d 863.

No. 1310. MARLOWE *v.* COAKLEY ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and petition. *Richard G. Logan* for respondents. Reported below: 404 F. 2d 70.

No. 1446. DODD *v.* PEARSON ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *John F. Sonnett, Raymond L. Falls, Jr.,* and *Donald J. Mulvihill* for petitioner. Reported below: 133 U. S. App. D. C. 279, 410 F. 2d 701.

No. 224, Misc. STURM *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Joyce F. Nedde,* Deputy Attorney General, and *Albert W. Harris, Jr.,* Assistant Attorney General, for respondents. Reported below: 395 F. 2d 446.

No. 1817, Misc. ALRED *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 406 F. 2d 743.

No. 1825, Misc. CAMPBELL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1850, Misc. PLOSS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1860, Misc. MONTGOMERY ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Robert J. Carson* for petitioners.

No. 1863, Misc. MIKE *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 1866, Misc. HOWARD *v.* NEW YORK; and
No. 1901, Misc. MILES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Jonathan L. Rosner* for petitioner in No. 1866, Misc. *Frank S. Hogan* and *Michael R. Juviler* for respondent in both cases. Reported below: 23 N. Y. 2d 527, 245 N. E. 2d 688.

No. 1886, Misc. PALMER *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1894, Misc. MORALES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1905, Misc. STEVENSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1906, Misc. DIAMOND *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1908, Misc. BAKER ET AL. *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1912, Misc. FLEMING *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1913, Misc. BALLARD *v.* HARRISON, CORRECTIONS DIRECTOR, ET AL. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Stewart H. Freeman*, Assistant Attorney General, for respondents.

No. 1914, Misc. REED *v.* DOYLE ET AL. C. A. 3d Cir. Certiorari denied.

No. 1919, Misc. HARDING *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 5 Md. App. 230, 246 A. 2d 302.

No. 1923, Misc. KOCH *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 1938, Misc. DAVIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit*, and *Robert G. Maysack* for the United States. Reported below: 133 U. S. App. D. C. 172, 409 F. 2d 458.

No. 1942, Misc. BYE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit*, and *Robert G. Maysack* for the United States.

No. 1957, Misc. STEVENSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1961, Misc. DAVIS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *W. S. Moore* for petitioner. Reported below: 218 So. 2d 17.

No. 1958, Misc. HUTCHINSON *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 979, Misc. SELLERS *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 5th Cir. Certiorari denied. *Charles Morgan, Jr., Reber F. Boult, Jr., Howard Moore, Jr., Morris Brown, Melvin L. Wulf, Martin Garbus,* and *Eleanor Holmes Norton* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander,* and *Robert V. Zener* for respondents. Reported below: 398 F. 2d 893.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE MARSHALL join, dissenting.

Petitioner is a Negro who was classified I–A by his local Selective Service Board in South Carolina, before his place of induction was transferred to his current residence in Georgia. Prior to receiving his order to report for induction, he filed suit in the District Court for the Northern District of Georgia to enjoin his induction on the ground that systematic exclusion of Negroes from local and appeals boards in South Carolina and Georgia violates the Constitution of the United States as well as the Military Selective Service Act of 1967,[1] 81 Stat. 100, 50 U. S. C. App. § 451 *et seq.* (1964 ed., Supp. III), and renders them powerless to induct him into the Armed Forces.

According to his uncontested allegations, South Carolina is a State with 161 board members, only one of whom is Negro. Thus, from a State in which 34.8% of the population is Negro, only 0.6% participates in the administration of the Selective Service. Moreover, in Georgia, where 28.5% of the population is Negro, members of the Negro race constitute only 0.2% of the 509 board members. Despite these statistics of exclu-

[1] "[I]n the interpretation and execution of the provisions of this title [including provisions for the appointment of board members] . . . there shall be no discrimination against any person on account of race or color . . . ." 50 U. S. C. App. § 455 (a).

sion,[2] and despite petitioner's assertion that his classification was racially motivated, the District Court refused to enjoin his induction.

Following that denial, petitioner noted an appeal. In the meantime, however, he was ordered to report for induction. After unsuccessful attempts to stay prosecution, and over his defense that he had been inducted by a Selective Service System from which Negroes had been studiously excluded, he was convicted of violating 50 U. S. C. App. § 462 (a) and sentenced to five years in prison.

It was only after his criminal conviction that the Court of Appeals decided his appeal from the District Court denial of a preliminary injunction. Reluctant to treat that civil appeal as moot, it reached the merits and decided that the exclusion of Negroes from local draft boards does not deprive them of jurisdiction to induct Negroes into the Armed Forces.[3] Petitioner comes to

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[2] It appears that in 1966, 23 States maintained local boards without a single Negro member, among them being States in which Negroes constituted up to 42% of the population. See Report, National Advisory Commission on the Selective Service Act 80 (1967).

[3] Judge Tuttle wrote a separate opinion in the case below, *sub nom. Sellers* v. *McNamara*, 398 F. 2d 893, at 894. Although considering himself bound by the "law of this circuit," as established in *Clay* v. *United States*, 397 F. 2d 901 (C. A. 5th Cir., cert. then pending, No. 271 of this Term, but subsequently granted and judgment vacated and remanded on other grounds, 394 U. S. 310), he admitted that:

"[H]ad our court not foreclosed the matter for our consideration, I would conclude that the issue is one which should be raised by direct attack [as in this case], and that the statute and the Constitution of the United States do forbid the practice which produces selective service boards of an entire state whose members are substantially all white, while classifying and ordering into service citizens of the state, approximately one third of whom are Negroes." 398 F. 2d, at 895.

this Court seeking a writ of certiorari to review that decision.

This is a case we should hear and decide.

The fact that the challenge to the Board's action is made in a pre-induction lawsuit is not necessarily fatal. Although § 10 (b)(3), 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. III), provides that there shall be no judicial review "of the classification or processing of any registrant" except as a defense in a criminal prosecution, there are exceptions to it. Thus we held in *Oestereich* v. *Selective Service Board,* 393 U. S. 233, that where the action of the Board was "lawless," the courts would give pre-induction review of the matter. In that case the Board had used "delinquency" proceedings to deprive a divinity student of his statutory exemption in retaliation for his having returned his registration certificate in dissent from our Vietnam policy.

This case also presents a statutory right. 50 U. S. C. App. § 455 (a) provides for the selection of members of Selective Service Boards "in an impartial manner" under rules and regulations prescribed by the President, "Provided, That in the selection of persons for training and service under this title . . . and *in the interpretation and execution of* the provisions of this title . . . , there shall be no discrimination against any person on account of race or color . . . ." (Emphasis supplied.)

While the present case was pending, Sellers was convicted of refusing induction; on appeal the Court of Appeals affirmed, but a petition for rehearing is pending.[4]

[4] After failing to obtain relief in the District Court below in his request for an injunction against his induction, Sellers appealed to the Court of Appeals. In the meantime, however, he was threatened with an immediate order to report for induction. Consequently, pending his appeal to the Court of Appeals he requested a stay of induction. Both the District Court and the Court of Appeals denied relief. Sellers then sought such a stay from MR. JUSTICE BLACK.

On April 18, 1967, MR. JUSTICE BLACK denied a stay of induction

The Court of Appeals refused to treat the present civil case as moot and instead treated it as a request for "an order requiring that he be discharged from his present service of sentence following his conviction."

If we assume that Sellers has a statutory right to a bi-racial Board, he would be entitled to pre-induction judicial review, if *Oestereich* is to have any life or meaning.

If that is true, a Board compounds the injury by bulldozing the man into the Army. I cannot believe we would ever hold that lawless Board action can render a case moot.

What the facts of this case on the issue of racial discrimination are we do not know.[5] The system of using an all-white Board may well result in black registrants

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pending appeal to the Court of Appeals. Sellers refused to report, and was convicted before the Court of Appeals could hear his civil appeal.

[5] In filling out his "Current Information Questionnaire," petitioner noted that his job with the Student Nonviolent Coordinating Committee (SNCC) consisted of coordinating an "organizational program to develop a political and economical awareness in the black community," for an organization whose admitted purpose was to develop "Black Power." His conviction in federal court for "trespassing," an offense arising out of a civil rights demonstration, is also in the record. Finally, a member of the local Board admitted to the State Director of the Selective Service that she had allowed an FBI agent to review petitioner's file, even though such access was in violation of Selective Service regulations.

A psychiatrist filed, as part of petitioner's Armed Forces physical, the following:

"[Petitioner] states he has animosities toward the Armed Services. The Negroes are '10% of the U. S. population, yet 30% of the casualties in Vietnam are Negroes.' They are 'the front line foot soldiers.' . . . He feels that the country 'will not give the Negroes any room.' He states that the Vietnamese are basically colored people and the Negro soldiers have no business there fighting other colored people. . . . He is considered to be a semi-professional race agitator."

being sent to Vietnam to do service for white registrants. Whether that is true or not, is not shown by the present record as there was no hearing.

It is common talk that in some areas where all-white Boards sit, the white registrant as distinguished from the black, need not even ask for deferment in order to obtain it. The presence of an all-white Board may, however, not be the basis of any lawful complaint. For on the facts of a particular case a I–A classification may be wholly warranted, irrespective of the racial context of the Board. On the other hand, the presence of an all-white Board in a racially prejudiced community may well result in blacks carrying more than their fair share of the Vietnam burden. Cf. *Wolff* v. *Selective Service Local Bd.*, 372 F. 2d 817. I assume that is what 50 U. S. C. App. § 455 (a) was designed to prevent. I would grant this petition for certiorari.

Rehearing Denied.

No. 343. UNITED STATES *v.* AN ARTICLE OF DRUG . . . BACTO-UNIDISK . . . , 394 U. S. 784;

No. 1126. FARINELLA ET AL. *v.* UNITED STATES, 394 U. S. 1000;

No. 1713, Misc. JESSY *v.* SUPERIOR COURT OF CALIFORNIA ET AL., 394 U. S. 1021; and

No. 1732, Misc. BULLIS *v.* HOCKER, WARDEN, *ante*, p. 915. Petitions for rehearing denied.

No. 1256, Misc. CAMPBELL *v.* UNITED STATES, 393 U. S. 1121. Motion for leave to file petition for rehearing denied.

No. 1290, Misc. RALPH *v.* MARYLAND, 394 U. S. 1002. Petition for rehearing and stay of execution denied.

JUNE 16, 1969.

Miscellaneous Orders.

No. —. FRIEDMAN *v.* UNITED STATES. C. A. 2d Cir. Application for bail presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *William M. Kunstler* for applicant. *Solicitor General Griswold* in opposition.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion for leave to file bill of complaint granted and defendant States allowed 60 days to answer. *Attorney General Mitchell* and *Solicitor General Griswold* for the United States. *James S. Erwin*, Attorney General, and *Robert G. Fuller, Jr.*, Assistant Attorney General, filed a brief in opposition for the State of Maine, joined by the Attorneys General for their respective States as follows: *George S. Pappagianis* of New Hampshire, *Robert H. Quinn* of Massachusetts, *Herbert F. DeSimone* of Rhode Island, *Louis J. Lefkowitz* of New York, *Arthur J. Sills* of New Jersey, *David P. Buckson* of Delaware, *Francis B. Burch* of Maryland, *Robert Y. Button* of Virginia, *Robert B. Morgan* of North Carolina, *Daniel R. McLeod* of South Carolina, *Arthur K. Bolton* of Georgia, and *Earl Faircloth* of Florida.

No. 163. YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY *v.* HARRIS ET AL. Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 393 U. S. 1013.] Case restored to calendar for reargument and set for oral argument immediately following Nos. 580 and 813, *infra*.

No. 244. BOYLE, JUDGE, ET AL. *v.* LANDRY ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 393 U. S. 974.] Case restored to calendar for reargument.

No. 2, Misc. CHANDLER, U. S. DISTRICT JUDGE *v.* JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES. Motion of Carl L. Shipley for leave to file a brief as *amicus curiae* granted. Motion to advance denied. Case set for oral argument on October 20, 1969, on motion for leave to file petition for writ of prohibition and/or mandamus. Additional briefs may be filed by the parties, and petitioner's brief, if any, is due within 60 days and that of respondent within 30 days thereafter. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. *Carl L. Shipley, pro se,* on motion for leave to file *amicus curiae* brief. *Thomas J. Kenan* for petitioner on motion to advance.

No. 1323, Misc. DAVIDSON *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Frederick R. Millar, Jr.,* Deputy Attorney General, for respondents.

No. 269. GUNN, SHERIFF, ET AL. *v.* UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM ET AL. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, 393 U. S. 819.] Case restored to calendar for reargument.

No. 2062, Misc. URSINI *v.* UNITED STATES;
No. 2065, Misc. GREENE *v.* NEW YORK ET AL.;
No. 2075, Misc. TIVIS *v.* UNITED STATES ET AL.;
No. 2103, Misc. SCOTT *v.* KROPP, WARDEN; and
No. 2168, Misc. CORBIN *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 580. SAMUELS ET AL. *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL.; and

No. 813. FERNANDEZ *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 393 U. S. 975.] Cases restored to calendar for reargument.

Probable Jurisdiction Noted.

No. 1363. CITY OF CHICAGO ET AL. *v.* UNITED STATES ET AL.; and

No. 1364. CITY OF CHICAGO ET AL. *v.* UNITED STATES ET AL. Appeals from D. C. N. D. Ill. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. *Raymond F. Simon, Charles E. Griffith III, Robert E. Kendrick, Arthur K. Bolton, Gordon P. MacDougall, William E. Nelson,* and *Chester L. Rigsby* for appellants in No. 1363; and *Messrs. Simon, Griffith, Kendrick, MacDougall,* and *Rigsby,* and *Edward J. Hickey, Jr., William G. Mahoney, Weldon A. Cousins,* and *Leon M. Despres* for appellants in No. 1364. *Albert E. Jenner, Jr., Thomas P. Sullivan,* and *Keith F. Bode* for appellee Chicago & Eastern Illinois R. Co. in No. 1363; *Joseph L. Lenihan, James W. Hoeland,* and *Harry R. Begley* for appellee Louisville & Nashville R. Co. in No. 1364; and *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro,* and *Robert W. Ginnane* for the United States et al. in both cases. Reported below: No. 1363, 294 F. Supp. 1103; No. 1364, 294 F. Supp. 1106.

No. 1415. WALZ *v.* TAX COMMISSION OF THE CITY OF NEW YORK. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *J. Lee Rankin* and *Stanley Buchsbaum* for appellee. Reported below: 24 N. Y. 2d 30, 246 N. E. 2d 517.

Certiorari Granted. (See also No. 1070, *ante*, p. 710; and No. 208, Misc., *ante*, p. 709.)

No. 1271, Misc. BARLOW ET AL. *v.* COLLINS, EXECUTIVE DIRECTOR, ALABAMA AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ET AL. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Jonathan Weiss, Alvin J. Bronstein, Donald A. Jelinek, Charles S. Conley,* and *Richard B. Sobol* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Peter L. Strauss, Alan S. Rosenthal,* and *Norman G. Knopf* for respondents. Reported below: 398 F. 2d 398.

Certiorari Denied.

No. 995. HOWARD *v.* UNITED STATES; and

No. 1089. LEVINSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Marvin W. Cherrin* for petitioner in No. 995, and *Joseph W. Louisell, Ivan E. Barris,* and *Frank W. Wiseman* for petitioners in No. 1089. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Leonard H. Dickstein* for the United States in both cases. Reported below: 405 F. 2d 971.

No. 1216. ADJMI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Milton E. Grusmark* and *Natalie Baskin* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Jesse J. McCrary, Jr.,* Assistant Attorney General, for respondent. Reported below: 208 So. 2d 859.

No. 1306. WALLS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. *William T. Lifland* for petitioner. Reported below: 406 F. 2d 505.

No. 1286. NEES *v.* CULBERTSON. C. A. 5th Cir. Certiorari denied. *Michael D. Matheny* and *Phillip Bordages* for petitioner. *Crawford C. Martin*, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *Hawthorne Phillips*, Executive Assistant Attorney General, *Robert C. Flowers* and *Lonny F. Zwiener*, Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 406 F. 2d 621.

No. 1290. A'HEARN *v.* COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF NEW YORK COUNTY LAWYERS' ASSN. Ct. App. N. Y. Certiorari denied. *George C. Wildermuth* and *Charles A. McCarty* for petitioner. *Daniel M. Shanley* for respondent. Reported below: 23 N. Y. 2d 916, 246 N. E. 2d 166.

No. 1319. TUCKER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1320. CUNNINGHAM BROTHERS, INC. *v.* BAIL ET AL. C. A. 7th Cir. Certiorari denied. *Jack E. Horsley* and *Richard F. Record, Jr.*, for petitioner. Reported below: 407 F. 2d 1165.

No. 1322. WEAVER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Edward Bennett Williams* and *Patrick M. Wall* for petitioner. Reported below: 41 Ill. 2d 434, 243 N. E. 2d 245.

No. 1337. ACACIA MUTUAL LIFE INSURANCE CO. ET AL. *v.* JORDAN, SUPERINTENDENT OF INSURANCE FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *John J. Wilson* for petitioners. *Hubert B. Pair, Richard W. Barton*, and *David P. Sutton* for respondent. Reported below: 133 U. S. App. D. C. 224, 409 F. 2d 1141.

No. 1327. SOUTHERN PACIFIC CO. *v.* SABELLA. Sup. Ct. Cal. Certiorari denied. *Arthur B. Dunne* for petitioner. *James F. Boccardo* for respondent. Reported below: 70 Cal. 2d 311, 449 P. 2d 750.

No. 1336. FOSTER ET AL. *v.* HAMBLIN, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *Henry D. Stratton* for petitioners. Reported below: 405 F. 2d 1043.

No. 1344. PLUMLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *Karl G. Feissner* for petitioner. Reported below: 4 Md. App. 671, 245 A. 2d 111.

No. 1351. STONEHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hans A. Nathan, Bert B. Rand, Joseph A. Ball, John L. Ingoldsby, Jr.,* and *Bertram H. Ross* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 405 F. 2d 738.

No. 1354. KRAUSE, ADMINISTRATOR *v.* CHARTIER ET AL. C. A. 1st Cir. Certiorari denied. *Edward M. O'Brien* and *Robert A. Dwyer* for petitioner. *Leonard A. Kiernan, Jr.,* for Chartier, *Knight Edwards* and *Stephan A. Fanning, Jr.,* for North Central Airways, Inc., and *Guy J. Wells* and *Thomas Dunne Gidley* for Petterutti, respondents. Reported below: 406 F. 2d 898.

No. 1356. SUGARMAN *v.* FORBRAGD ET AL. C. A. 9th Cir. Certiorari denied. *George C. Martinez* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* filed a memorandum with respect to mootness. Reported below: 405 F. 2d 1189.

No. 1340. ACARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* and *H. Elliot Wales* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 512.

No. 1355. BLUMCRAFT OF PITTSBURGH *v.* CITIZENS & SOUTHERN NATIONAL BANK OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. *James C. McConnon* and *Henry N. Paul, Jr.*, for petitioner. *Warren N. Williams, Gordon D. Schmidt, W. Francis Marion,* and *William T. Bullinger* for respondents. Reported below: 407 F. 2d 557.

No. 1369. THAL *v.* COMMONWEALTH FINANCIAL CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Albert B. Gerber* for petitioner. *Solicitor General Griswold, Philip A. Loomis, Jr., David Ferber,* and *Paul Gonson* for respondent Securities and Exchange Commission, and *Morris M. Wexler* and *Leon S. Forman* for respondents Pitman et al. Reported below: 408 F. 2d 640.

No. 1377. MARRA BROS., INC. *v.* LONGO. C. A. 2d Cir. Certiorari denied. *Sidney A. Schwartz* for petitioner. *Angelo C. Gucciardo* for respondent. Reported below: 407 F. 2d 401.

No. 986. HILAND DAIRY, INC., ET AL. *v.* KROGER CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gray L. Dorsey, Lynn C. Paulson,* and *Edward F. O'Herin* for petitioners. *Norman Diamond* for respondent. *Solicitor General Griswold, Assistant Attorney General McLaren, Lawrence G. Wallace,* and *Howard E. Shapiro* filed a memorandum for the United States as *amicus curiae,* by invitation of the Court, 394 U. S. 903. Reported below: 402 F. 2d 968.

No. 1365. PINE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *William H. Tinney* for petitioner. *Gary K. Nelson*, Attorney General of Arizona, and *Carl Waag*, Assistant Attorney General, for respondent. Reported below: See 8 Ariz. App. 430, 446 P. 2d 940.

No. 1367. BLACKWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 405 F. 2d 625.

No. 1309. GUIDO *v.* CITY OF SCHENECTADY ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin L. Wulf*, *Eleanor Holmes Norton*, and *Joseph Harris* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Ruth Kessler Toch*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent Reynolds. Reported below: 404 F. 2d 728.

No. 1329. NEW HAMPSHIRE *v.* ATOMIC ENERGY COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *R. Peter Shapiro* for petitioner. *Solicitor General Griswold* and *Joseph F. Hennessey* for respondents Atomic Energy Commission et al. *James M. Jeffords*, *pro se*, and *Edwin H. Amidon, Jr.*, Assistant Attorney General, for the Attorney General of Vermont as *amicus curiae*, in opposition. Reported below: 406 F. 2d 170.

No. 1342. LEO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Patrick M. Wall* for petitioner. Reported below: 23 N. Y. 2d 556, 245 N. E. 2d 705.

No. 1338. CHENG HO MUI ET AL. *v.* RINALDI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abraham Lebenkoff* and *Jules E. Coven* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for respondent. Reported below: 408 F. 2d 28.

No. 1368. BECK, PENAL FARM SUPERINTENDENT, ET AL. *v.* WINTERS. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joe Purcell,* Attorney General of Arkansas, *Don Langston,* Deputy Attorney General, and *Richard B. Adkisson* for petitioners. *Jack Greenberg, Michael Meltsner,* and *Anthony G. Amsterdam* for respondent. Reported below: 407 F. 2d 125.

No. 1424. EIMCO CORP. *v.* PETERSON FILTERS & ENGINEERING CO. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Granville M. Brumbaugh* and *Mark N. Donohue* for petitioner. *Walter D. Ames* and *Richard E. Babcock, Jr.,* for respondents. Reported below: 406 F. 2d 431.

No. 1276. ROBERTS *v.* MCDONALD ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Stephan A. Trimble* for respondents.

No. 143, Misc. ADAMS *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondents.

No. 1419. H. K. PORTER CO., INC. *v.* UNITED SAW, FILE & STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION No. 22254, AFL–CIO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Philip H. Strubing* for petitioner. *Richard H. Markowitz* for respondent. Reported below: 406 F. 2d 643.

No. 13, Misc. CRUME *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *William E. Gray* for petitioner. Reported below: 383 F. 2d 36.

No. 956, Misc. RIVERA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Eugene Gold* and *Harold M. Brown* for respondent. Reported below: 22 N. Y. 2d 453, 239 N. E. 2d 873.

No. 1174, Misc. SMITH *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *John P. Oakes*, Deputy Attorney General, for respondent.

No. 1313, Misc. DIAL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty* for petitioner. *William J. Scott*, Attorney General of Illinois, and *James R. Thompson, Joel M. Flaum*, and *Thomas J. Immel*, Assistant Attorneys General, for respondent. Reported below: 95 Ill. App. 2d 345, 238 N. E. 2d 122.

No. 1491, Misc. FRYAR *v.* UNITED STATES; and

No. 1636, Misc. FRYAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit*, and *Robert G. Maysack* for the United States in both cases. Reported below: 404 F. 2d 1071.

No. 1347, Misc. MILNE *v.* SHELL OIL CO. Sup. Ct. Vt. Certiorari denied. *John P. Monte* for respondent. Reported below: 127 Vt. 249, 246 A. 2d 837.

No. 1368, Misc. ARMSTRONG *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *A. F. Summer,* Attorney General of Mississippi, and *Guy N. Rogers,* Assistant Attorney General, for respondent. Reported below: 214 So. 2d 589.

No. 1421, Misc. POOLE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *H. C. Mike Watkins* for petitioner. *A. F. Summer,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent. Reported below: 216 So. 2d 425.

No. 1537, Misc. GOLSON ET AL. *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *James E. Knox, Jr.,* for petitioners. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 401 F. 2d 9.

No. 1554, Misc. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 402 F. 2d 792.

No. 1661, Misc. KELLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1662, Misc. MILNE *v.* LAFLAMME. Sup. Ct. Vt. Certiorari denied. Reported below: 127 Vt. 301, 248 A. 2d 692.

No. 1711, Misc. CAMARILLO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 266 Cal. App. 2d 523, 72 Cal. Rptr. 296.

No. 1721, Misc. KOZUCK ET UX. *v.* PEOPLES TRUST COMPANY OF BERGEN COUNTY. Sup. Ct. N. J. Certiorari denied.

No. 1758, Misc. CASTRUITA *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1780, Misc. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1799, Misc. DAILY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 41 Ill. 2d 116, 242 N. E. 2d 170.

No. 1796, Misc. BRUNETTE *v.* EDMO ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 1828, Misc. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Arthur Litz* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 407 F. 2d 356.

No. 1831, Misc. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James Giles Hudson, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 407 F. 2d 582.

No. 1845, Misc. FOWLER *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 407 F. 2d 1329.

No. 1835, Misc. TONGUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 407 F. 2d 774.

No. 1846, Misc. GOODWIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 405 F. 2d 178.

No. 1865, Misc. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 719.

No. 1869, Misc. AADAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Whitman Knapp* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 407 F. 2d 381.

No. 1872, Misc. MARZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1881, Misc. ROESSLER *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 79 N. M. 787, 450 P. 2d 196.

No. 1884, Misc. CHURCHWELL *v.* BECKHAM. C. A. 6th Cir. Certiorari denied.

No. 1887, Misc. GRISSOM *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1885, Misc. TANTASH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Futlick* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 409 F. 2d 227.

No. 1889, Misc. PINELLI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Sheldon F. Goldberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 403 F. 2d 998.

No. 1897, Misc. PEINADO *v.* ADULT AUTHORITY OF THE DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 405 F. 2d 1185.

No. 1903, Misc. DURHAM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 70 Cal. 2d 171, 449 P. 2d 198.

No. 1904, Misc. HUARNECK *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1907, Misc. QUIGLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1911, Misc. GALLAGHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 406 F. 2d 102.

No. 1922, Misc. CHASE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Vincent C. Murovich, Jr.,* for petitioner.

No. 1910, Misc. FLEISHOUR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1921, Misc. DALLAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1926, Misc. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1927, Misc. SHIELDS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 1932, Misc. BURKS *v.* PATE, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 1935, Misc. DESROCHES *v.* CARRELLAS, JUDGE. Sup. Ct. R. I. Certiorari denied.

No. 1937, Misc. KAMSLER *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 1946, Misc. MCELROY *v.* PATUXENT INSTITUTION DIRECTOR ET AL. C. A. 4th Cir. Certiorari denied.

No. 1947, Misc. DAVIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1952, Misc. TIMMONS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: —— Cal. App. 2d ——, 75 Cal. Rptr. 212.

No. 1953, Misc. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: —— Cal. 2d ——, 450 P. 2d 865.

No. 1956, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1950, Misc. LeMay *v.* Henderson, Warden. C. A. 6th Cir. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, for respondent. Reported below: 407 F. 2d 494.

No. 1954, Misc. McChesney *v.* LaVallee, Warden. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 31 App. Div. 2d 1, 294 N. Y. S. 2d 598.

No. 1962, Misc. Hooper *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. *W. S. Moore* for petitioner. Reported below: 218 So. 2d 19.

No. 1968, Misc. Pepitone *v.* California et al. Sup. Ct. Cal. Certiorari denied.

No. 1990, Misc. Mauch *v.* Buchkoe, Warden. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 1997, Misc. Kam, Executor *v.* City and County of Honolulu. Sup. Ct. Hawaii. Certiorari denied. *Joseph A. Ryan* for petitioner.

No. 952, Misc. Sayers et al. *v.* New York. Ct. App. N. Y. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Joseph Harris* for petitioners. Reported below: 22 N. Y. 2d 571, 240 N. E. 2d 540.

No. 2042, Misc. Jones *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. *Joseph F. Walsh* for petitioner. Reported below: 53 N. J. 568, 252 A. 2d 37.

No. 2015, Misc. LOWERY *v.* PINTO, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 1135, Misc. WINEGAR *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward Martin Wise* for petitioner. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Stewart H. Freeman*, Assistant Attorney General, for respondent. Reported below: 380 Mich. 719, 158 N. W. 2d 395.

Rehearing Granted. (See No. 1070, *ante*, p. 710.)

Rehearing Denied.

No. 1050. SOUTHERN PACIFIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA, 394 U. S. 845;

No. 1109. WEED *v.* BILBREY ET AL., 394 U. S. 1018;

No. 1152. SOUTHERN PACIFIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., 394 U. S. 845;

No. 642, Misc. HALLIDAY *v.* UNITED STATES, 394 U. S. 831;

No. 688, Misc. HANGER ET AL. *v.* UNITED STATES, 393 U. S. 1119;

No. 1263, Misc. CAREY *v.* GEORGE WASHINGTON UNIVERSITY, 394 U. S. 910; and

No. 1741, Misc. WHITEHEAD *v.* MICHIGAN, 394 U. S. 1021. Petitions for rehearing denied.

JUNE 21, 1969.

Dismissal Under Rule 60.

No. 2197, Misc. HEDBERG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

JUNE 23, 1969.

Dismissal Under Rule 60.

No. 1435. HAYES *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Wilfred C. Varn* and *Robert M. Ervin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 407 F. 2d 189.

Miscellaneous Orders.

No. —. CLEVELAND BOARD OF EDUCATION *v.* MASHETER, DIRECTOR OF HIGHWAYS. Sup. Ct. Ohio. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Donald J. Guittar* for applicant. *Paul W. Brown,* Attorney General of Ohio, and *I. Charles Rhoads,* Assistant Attorney General, in opposition. Reported below: 17 Ohio St. 2d 27, 244 N. E. 2d 745.

No. —. SLOAN *v.* LOCAL BOARD NO. 1, BERNALILLO COUNTY, NEW MEXICO, ET AL. C. A. 10th Cir. Application for stay presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. *Solicitor General Griswold* in opposition.

No. 216. MARTONE *v.* MORGAN ET AL., 393 U. S. 12. Respondents requested to file a response to petition for rehearing within 30 days.

No. 2085, Misc. SAFEGUARD MUTUAL INSURANCE CO. *v.* FREEDMAN, U. S. CIRCUIT JUDGE, ET AL. C. A. 3d Cir. Motion to expedite denied. *Malcolm W. Berkowitz* and *Malcolm H. Waldron, Jr.,* on the motion.

No. 1036. TOBACCO INSTITUTE, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 1059. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 1060. AMERICAN BROADCASTING COMPANIES, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 1067. NATIONAL BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. The Solicitor General is invited to file a memorandum expressing the views of the respondents with respect to the applicability to these cases of the opinion in *Red Lion Broadcasting Co., Inc., et al.* v. *Federal Communications Commission et al., ante,* p. 367. Reported below: — U. S. App. D. C. —, 405 F. 2d 1082.

No. 1474. TURNER *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, *ante,* p. 933.] Motion for the appointment of counsel granted. It is ordered that *Josiah E. DuBois, Jr., Esquire,* of Camden, New Jersey, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1888, Misc. EVERETT *v.* WARDEN, U. S. PENITENTIARY, MCNEIL ISLAND, WASHINGTON. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 2164, Misc. JONES *v.* PRATT & WHITNEY, INC., ET AL. C. A. 1st Cir. Motion to expedite denied.

No. 2199, Misc. PURYEAR *v.* HOGAN, DISTRICT ATTORNEY OF NEW YORK COUNTY, ET AL. Appeal from Ct. App. N. Y. Motion to expedite denied.

Probable Jurisdiction Noted.

No. 1131, Misc. BODDIE ET AL. *v.* CONNECTICUT ET AL. Appeal from D. C. Conn. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Robert K. Killian,* Attorney General of Connecticut, and *Raymond J. Cannon,* Assistant Attorney General, for appellees. Reported below: 286 F. Supp. 968.

No. 1977, Misc. SANKS ET AL. *v.* GEORGIA ET AL. Appeal from Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Case transferred to appellate docket and set for oral argument immediately following No. 1232 [*Simmons* v. *West Haven Housing Authority,* 394 U. S. 957]. *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Alfred L. Evans, Jr.,* and *A. Joseph Nardone,* Assistant Attorneys General, for appellee State of Georgia. Reported below: 225 Ga. 88, 166 S. E. 2d 19.

Certiorari Granted. (See also No. 598, *ante,* p. 828; No. 837, *ante,* p. 814; No. 906, *ante,* p. 828; No. 1022, *ante,* p. 823; No. 1213, *ante,* p. 828; No. 1273, *ante,* p. 828; No. 540, Misc., *ante,* p. 818; No. 652, Misc., *ante,* p. 824; No. 1259, Misc., *ante,* p. 824; and No. 1879, Misc., *ante,* p. 830.)

No. 995, Misc. PARKER *v.* NORTH CAROLINA. Ct. App. N. C. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 1064 [394 U. S. 956]. *T. W. Bruton,* Attorney General of North Carolina, and *James F. Bullock,* Deputy Attorney General, for respondent. Reported below: 2 N. C. App. 27, 162 S. E. 2d 526.

No. 846. WALLER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari granted and case set for oral argument immediately following No. 1099 [*Ashe* v. *Swenson*, 393 U. S. 1115]. *Melvin L. Wulf* and *Gardner W. Beckett, Jr.*, for petitioner. *Earl Faircloth*, Attorney General of Florida, and *William D. Roth*, Assistant Attorney General, for respondent. Reported below: 213 So. 2d 623.

No. 515, Misc. MOON *v.* MARYLAND. Ct. App. Md. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Case transferred to appellate docket and set for argument immediately following No. 477 [*ante*, p. 918]. In addition to the questions presented by the petition for writ of certiorari, counsel requested to brief and argue question of retroactivity of *North Carolina* v. *Pearce*, *ante*, p. 711, and *Simpson* v. *Rice*, *ante*, p. 711. *Robert Anthony Jacques* for petitioner. *Francis B. Burch*, Attorney General of Maryland, *Edward F. Borgerding*, First Assistant Attorney General, and *Thomas A. Garland*, Assistant Attorney General, for respondent. Reported below: 250 Md. 468, 243 A. 2d 564.

No. 1254, Misc. PRICE *v.* GEORGIA. Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 515, Misc., *supra*. In addition to questions presented by petition for a writ of certiorari, counsel requested to brief and argue question of retroactivity of *Benton* v. *Maryland*, *ante*, p. 784, and whether that decision is applicable to this case. *Allyn M. Wallace* for petitioner. *Arthur K. Bolton*, Attorney General of Georgia, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, and *Marion O. Gordon* and *Mathew Robins*, Assistant Attorneys General, for respondent. Reported below: See 118 Ga. App. 207, 163 S. E. 2d 243.

No. 1246. ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 8th Cir. Certiorari granted. *Milton R. Wessel* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for Camp, and *Fallon Kelly* for American National Bank & Trust Co., respondents. Reported below: 406 F. 2d 837.

No. 1925, Misc. BRADY *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 1064 [394 U. S. 956]. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 404 F. 2d 601.

No. 2083, Misc. BUIE *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 1473 [*Minor* v. *United States, ante,* p. 932]. *Solicitor General Griswold* for the United States. Reported below: 407 F. 2d 905.

Certiorari Denied. (See also No. 1370, *ante,* p. 827; No. 1414, *ante,* p. 823; No. 1642, Misc., *ante,* p. 829; and No. 1879, Misc., *ante,* p. 830; and No. 1539, *ante,* p. 826 (before judgment).)

No. 916. VARITIMOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Murray H. Falk* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 404 F. 2d 1030.

No. 1163. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 405 F. 2d 253.

No. 1307. HELIGMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Irl B. Baris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 407 F. 2d 448.

No. 1323. POLSON *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. *Thomas L. Smith* for petitioner. Reported below: 92 Idaho 615, 448 P. 2d 229.

No. 1325. HALE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John C. Moran* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 406 F. 2d 476.

No. 1345. ZAFFARANO *v.* FITZPATRICK, WARDEN. C. A. 2d Cir. Certiorari denied. *Irving Spieler* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for respondent. Reported below: 404 F. 2d 474.

No. 1375. WOLF CORP. ET AL. *v.* GREEN; and

No. 1376. TROSTER, SINGER & CO. *v.* GREEN. C. A. 2d Cir. Certiorari denied. *Milton E. Mermelstein* and *Jay D. Fischer* for Wolf Corp. et al., and *Alvin K. Hellerstein* for David Berdon & Co., petitioners in No. 1375; and *Frank W. Adams* for petitioner in No. 1376. *Irving Malchman* for respondent in both cases. Reported below: 406 F. 2d 291.

No. 1358. PACIFIC OIL CO. *v.* HICKEL, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. *Francis R. Kirkham* and *Thomas E. Haven* for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *Edmund B. Clark* for respondent. Reported below: 406 F. 2d 452.

No. 1371. GOLDBLATT *v.* UNITED STATES;

No. 1372. COTTEN *v.* UNITED STATES; and

No. 1373. WECHSLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *David I. Shapiro* and *George Kaufmann* for petitioner in No. 1371; *Raymond W. Bergan* for petitioner in No. 1372; and *Philip F. Herrick* and *Hans A. Nathan* for petitioner in No. 1373. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States in all three cases. Reported below: 408 F. 2d 1184.

No. 1378. LUTSKO ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *H. David Rothman* for petitioners.

No. 1379. HUMPHREY ET AL. *v.* DEALERS TRANSPORT CO. ET AL. C. A. 6th Cir. Certiorari denied. *H. Solomon Horen, Josephine P. Hughett, William S. Zeman, Mozart G. Ratner,* and *George Kaufmann* for petitioners. *Newell N. Fowler* for Dealers Transport Co., and *Edgar A. Zingman* for E. & L. Transport Co., respondents.

No. 500. SCHMEAR *v.* GAGNON, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent. Reported below: 396 F. 2d 786.

No. 1383. ROACH *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *Melvin L. Wulf* for petitioner. *Robert K. Killian,* Attorney General of Connecticut, for respondent.

No. 1384. BALDWIN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Francis R. Salazar* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 407 F. 2d 1286.

No. 1476. NORFOLK & WESTERN RAILWAY CO. *v.* SMITH. C. A. 4th Cir. Certiorari denied. *John S. Shannon* for petitioner. Reported below: 407 F. 2d 501.

No. 1500. PIKES PEAK BROADCASTING CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Richard Hildreth* for Pikes Peak Broadcasting Co., and *James A. McKenna* and *Vernon L. Wilkinson* for Sangre De Cristo Broadcasting Corp., petitioners. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Henry Geller,* and *D. Biard MacGuineas* for respondents. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 271, Misc. DAUGHERTY *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Lola M. McAlpin,* Deputy Attorney General, for respondents.

No. 734, Misc. HARTLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, *Dickee M. Howard,* Assistant Attorney General, for respondent. Reported below: 4 Md. App. 450, 243 A. 2d 665.

No. 1314. GARWIN CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Joseph A. Perkins* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 1381. TOONI ET AL. *v.* ZUCKERT, SECRETARY OF THE AIR FORCE. C. A. 6th Cir. Motion of District Lodge 23, International Association of Machinists & Aerospace Workers for leave to file a brief as *amicus curiae* granted. Certiorari denied. *William R. Coen* for petitioners. *Solicitor General Griswold* for respondent. *Charles F. Horn* for District Lodge 23, International Association of Machinists & Aerospace Workers as *amicus curiae* in support of the petition.

No. 1045, Misc. SAVILLE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 397.

No. 1086, Misc. DAVIS *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 400 F. 2d 279.

No. 1422, Misc. VICKERS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. *George A. Daugherty* for petitioner. *Chauncey H. Browning, Jr.,* Attorney General of West Virginia, and *George E. Lantz* and *James H. Coleman,* Assistant Attorneys General, for respondent.

No. 1428, Misc. LISS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Michael F. Dillon* for respondent.

No. 1282, Misc. CAVANAUGH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Gilbert F. Nelson* for petitioner. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Ronald M. George*, Deputy Attorney General, for respondent. Reported below: 69 Cal. 2d 262, 444 P. 2d 110.

No. 1518, Misc. SCOLARI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 406 F. 2d 563.

No. 1543, Misc. RANGEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *John Cutler* for petitioner. *Crawford C. Martin*, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *Hawthorne Phillips*, Executive Assistant Attorney General, *Robert C. Flowers* and *Gilbert J. Pena*, Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 435 S. W. 2d 143.

No. 1559, Misc. GURLESKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit*, and *Edward Fenig* for the United States. Reported below: 405 F. 2d 253.

No. 1737, Misc. STOPPELMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein* for the United States. Reported below: 406 F. 2d 127.

No. 1855, Misc. WARNOCK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1833, Misc. PASTERCHIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 400 F. 2d 696.

No. 1858, Misc. STOCKER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 4 Md. App. 275, 242 A. 2d 588.

No. 1859, Misc. CHIN KEE *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. *John D. O'Reilly III* for petitioner. *Robert H. Quinn,* Attorney General of Massachusetts, *John Wall* and *Howard M. Miller,* Assistant Attorneys General, and *John J. Droney* for respondent. Reported below: 407 F. 2d 10.

No. 1880, Misc. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Howard Moore, Jr.,* and *Peter E. Rindskopf* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 406 F. 2d 456.

No. 1883, Misc. TURNER *v.* WILKES ET AL. C. A. 6th Cir. Certiorari denied. *Leo E. Bearman* for respondents.

No. 1896, Misc. WHITE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1899, Misc. GREEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1909, Misc. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1900, Misc. RISPO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. *B. Nathaniel Richter* for petitioner. Reported below: 213 Pa. Super. 88, 245 A. 2d 868.

No. 1916, Misc. RUTHERFORD *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 406 F. 2d 217.

No. 1920, Misc. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Richard W. Buchanan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Leonard H. Dickstein* for the United States. Reported below: 409 F. 2d 184.

No. 1929, Misc. SQUIRE *v.* RUSH, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. *Irwin I. Kimmelman* and *Emanuel S. Lowinger* for respondents. Reported below: 408 F. 2d 372.

No. 1931, Misc. SAFLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 408 F. 2d 603.

No. 1933, Misc. LELII *v.* DOLENTE CONSTRUCTION CO. ET AL. Sup. Ct. Pa. Certiorari denied. *Leonard Zack* for petitioner. *Richard D. Harburg* for respondents.

No. 1948, Misc. HARRIS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Richard A. Sicking* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Harold Mendelow* and *Arden M. Siegendorf,* Assistant Attorneys General, for respondent. Reported below: 406 F. 2d 1.

No. 1940, Misc. MORALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1951, Misc. PARRISH *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *George W. Shadoan* for petitioner. Reported below: 408 F. 2d 60.

No. 1955, Misc. CATON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Irl B. Baris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 407 F. 2d 367.

No. 1963, Misc. SUTHERLAND *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* for respondent.

No. 1964, Misc. MCCREARY *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 406 F. 2d 1264.

No. 1966, Misc. HENDERSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. *S. Carter McMorris* for petitioner.

No. 1970, Misc. HILL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 98 Ill. App. 2d 352, 240 N. E. 2d 801.

No. 2077, Misc. LEIGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *LeRoy E. Batchelor, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 408 F. 2d 1184.

No. 395, Misc. CHRISMAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Jack Wiseman* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Clifford K. Thompson, Jr.,* Deputy Attorney General, and *Albert W. Harris, Jr.,* Assistant Attorney General, for respondent. Reported below: 256 Cal. App. 2d 425, 64 Cal. Rptr. 733.

No. 1037, Misc. MAHONEY *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Gretchen White Oberman* and *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for respondent. Reported below: 396 F. 2d 887.

No. 1097, Misc. HARRIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. *John J. Cleary* for petitioner. *William J. Scott,* Attorney General of Illinois, and *James R. Thompson, Joel M. Flaum, James B. Zagel,* and *Thomas J. Immel,* Assistant Attorneys General, for respondent. Reported below: 97 Ill. App. 2d 288, 240 N. E. 2d 123.

No. 1104, Misc. JACQUES *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE HARLAN dissents for the reasons stated in his separate opinion in *North Carolina* v. *Pearce, ante,* p. 744. *Leo Kaplowitz* for respondent. Reported below: 52 N. J. 481, 246 A. 2d 444.

No. 550, Misc. JAMISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Solicitor General Griswold* for the United States. Reported below: 395 F. 2d 716.

No. 1440, Misc. GONSIOR *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Edsel W. Haws*, Deputy Attorney General, for respondent.

No. 1824, Misc. BYRNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Beatrice Rosenberg* for the United States. Reported below: 408 F. 2d 599.

No. 1868, Misc. NEAL ET AL. *v.* SAGA SHIPPING CO., S. A., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Arthur J. Mandell* for petitioners. *E. D. Vickery* for Saga Shipping Co., S. A., and *Robert Eikel* for Strachan Shipping Co., respondents. Reported below: 407 F. 2d 481.

No. 1941, Misc. RICHARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *Albert Datz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg*, and *Roger A. Pauley* for the United States. Reported below: 408 F. 2d 884.

No. 1945, Misc. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Crawford C. Martin*, Attorney General of Texas, for respondent. Reported below: 437 S. W. 2d 831.

Rehearing Denied.

No. 297. IMMIGRATION AND NATURALIZATION SERVICE *v.* STANISIC, *ante*, p. 62;

No. 1113. TELEPHONE USERS ASSOCIATION, INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL., *ante*, p. 910;

No. 1191. MORGAN *v.* NELSON ET AL., *ante*, p. 911;

No. 1235. HUBBARD ET AL. *v.* KIEFEL, *ante*, p. 908;

No. 1257. LOPO *v.* SAKS FIFTH AVENUE, *ante*, p. 211;

No. 1769, Misc. GOFF *v.* VETERANS ADMINISTRATION, *ante*, p. 927;

No. 1795, Misc. BERNSTEIN *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK, *ante*, p. 928; and

No. 1930, Misc. SMILEY *v.* CALIFORNIA ET AL., *ante*, p. 919. Petitions for rehearing denied.

No. 1670, Misc. MOYE *v.* SIOUX CITY & NEW ORLEANS BARGE LINES, INC., *ante*, p. 913. Motion of American Trial Lawyers Association, Admiralty Section, for leave to file a brief as *amicus curiae* denied. Petition for rehearing denied. *Raymond H. Kierr* and *Eldon E. Fallon* on the motion.

FEDERAL RULES OF PROCEDURE FOR UNITED STATES MAGISTRATES

Effective May 19, 1969

The Federal Rules of Procedure for United States Magistrates were prescribed by the Supreme Court of the United States pursuant to 18 U. S. C. § 3402. (References herein to Title 18 of the United States Code (except for § 1) are to Supplement IV of the 1964 edition.)

These rules became effective as of the date of the Court's order, *post*, p. 990.

SUPREME COURT OF THE UNITED STATES

MONDAY, MAY 19, 1969

ORDERED that the following rules, to be known as the Federal Rules of Procedure for United States Magistrates, be and they hereby are prescribed pursuant to Section 3402 of Title 18, United States Code. These rules shall take effect as of the date of this order.

MR. JUSTICE BLACK casts no vote as to these rules.

FEDERAL RULES OF PROCEDURE FOR UNITED STATES MAGISTRATES.

Rule 1. Scope.

These rules apply to proceedings before United States magistrates and in the district courts under 18 U. S. C. §§ 3401, 3402, relating to trial of minor offenses by magistrates, and appeal from conviction in such cases.

Rule 2. Applicability of district court rules.

Procedures not provided for herein shall be governed by the Rules of Criminal Procedure for the United States District Courts to the extent they may be applicable.

Rule 3. The complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a United States magistrate.

Rule 4. Warrant or summons upon complaint.

(*a*) *Issuance.*—If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it or a summons for the appearance of the defendant shall issue in lieu thereof. The finding of probable cause may be based upon reliable hearsay. Before ruling on a request for a warrant the United States magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recorded by suitable recording equipment. To carry out the policy against unnecessary detention of defendants prior to trial, the magistrate

may issue a summons instead of a warrant and shall issue a summons instead of a warrant whenever requested to do so by the attorney for the government. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(*b*) *Form.*

(*1*) *Warrant.*—The warrant shall be signed by the United States magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available United States magistrate.

(*2*) *Summons.*—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a United States magistrate at a stated time and place.

(*c*) *Execution or service; and return.*—The warrant shall be executed, the summons served, and return made as provided for in rule 4 (c) of the Rules of Criminal Procedure for the United States District Courts.

Rule 5. Initial appearance before the United States magistrate.

(*a*) *Filing of complaint.*—If a person arrested without a warrant is brought before a United States magistrate, a complaint shall be filed forthwith. When a person, arrested with or without a warrant or given a summons, appears initially before the United States magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(*b*) *Statement by the United States magistrate.*—The United States magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to

obtain counsel, and of the circumstances under which he might secure pretrial release under 18 U. S. C. § 3146. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The United States magistrate shall allow the defendant reasonable time and opportunity to consult counsel.

(*c*) *Minor offenses.*—If the charge against the defendant is a minor offense triable by the United States magistrate under 18 U. S. C. § 3401, the United States magistrate shall carefully explain to the defendant that he has a right to trial in the district court, and shall not proceed to call upon the defendant to plead or try the case unless the defendant, after such explanation, signs a written consent to be tried before the United States magistrate that specifically waives both a trial before the district court and any right to trial by jury that he may have. Proceedings shall be taken down by a court reporter or recorded by suitable sound recording equipment.

(*d*) *Offenses not triable by the United States magistrate.*—If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead and the United States magistrate shall proceed as follows:

(*1*) *Right to preliminary examination.*—The United States magistrate shall inform the defendant of his right to a preliminary examination. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense which is to be tried in the district court including either a minor offense or a petty offense. If the defendant waives preliminary examination, the United States magistrate may forthwith hold him to answer in the district court. If the defendant does not waive examination, the United States magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in

any event not later than the periods prescribed in 18 U. S. C. § 3060.

(2) *Pretrial release.*—To achieve the policy against unnecessary detention of defendants prior to trial, the United States magistrate shall, at the earliest opportunity, authorize the release of the defendant where appropriate under the terms provided by these rules and by 18 U. S. C. § 3146.

Rule 6. Arraignment.

If the defendant consents in writing to be tried by the United States magistrate, the magistrate shall take the defendant's plea to the charge set forth in the complaint. If the defendant indicates a desire to plead guilty or nolo contendere, the magistrate shall proceed in accordance with the requirements of rule 11 of the Rules of Criminal Procedure for the United States District Courts. If the defendant pleads not guilty, the magistrate shall either conduct a trial immediately or fix a time for the trial.

Rule 7. Trial.

(a) *Date of trial.*—The date of trial shall be fixed at such a time as will afford the defendant a reasonable opportunity for preparation and for representation by counsel if desired.

(b) *Procedure.*—The trial shall be conducted as are trials of criminal cases in the district court by a district judge in a criminal case where a jury is waived.

(c) *Record.*—Proceedings under this rule shall be taken down by a court reporter or recorded by suitable sound recording equipment, except that, in the case of a person charged with a petty offense as defined in 18 U. S. C. § 1, the defendant may waive the requirement that a verbatim record be kept.

Rule 8. Forfeiture of collateral in lieu of appearance.

When authorized by a local rule of the district court, a magistrate may accept a forfeiture of collateral security, in lieu of appearance, as a proper disposition of a case involving a petty offense as defined in 18 U. S. C. § 1.

CONSENT TO PROCEEDING IN DEFENDANT'S ABSENCE AND AUTHORIZATION FOR REPRESENTATIVE TO APPEAR

I, the undersigned, agree to have my case brought before the United States Magistrate for the Northern District of California, on the — day of ————, 19—, at 2:00 o'clock PM of said day or thereafter, to answer a charge of violating Sec. 13, Title 18, US Code and Section(s) ———— of the California Vehicle Code at the Presidio of San Francisco, California and hereby consent to have my case tried before said United States Magistrate on said charge and appoint as my representative ————————, to appear for me at said time and to do all things necessary to conclude the proceedings in my absence. I understand that I am entitled to be represented by counsel and to elect to be tried before the United States District Court in these proceedings, and that in signing this consent, I waive such rights.

Signature of defendant.

[] If you wish to have these proceedings handled in your absence, it will be necessary for you to sign this form and enclose check or money order, made payable to the United States Magistrate in the amount of $——. This amount will then be forfeited as a fine and the matter terminated.

[] This office is in receipt of your check/money order in the amount of $——. The matter, however, cannot be terminated without your signing this form.

This form must be returned to the address indicated below:

Office of the Post Provost Marshal
Presidio of San Francisco, California
Attn. US Courts Liaison NCO

Rule 9. Docket.

The United States magistrate's proceedings shall be entered in his docket which shall show: (1) the defendant's written consent to be tried before the United States magistrate; (2) the date of the complaint and upon whose oath it was made; (3) the date of the issue and service of the warrant; (4) the defendant's plea or pleas; (5) the names of the witnesses for the United States

and for the defendant and a condensed summary of the testimony of each and of any documentary evidence received (whenever there is no record kept in accordance with rule 7 (c)); (6) the judgment and sentence of the United States magistrate.

Rule 10. Probation.

(a) A magistrate who exercises trial jurisdiction under this section, and before whom a person is convicted or pleads either guilty or nolo contendere, may, with the approval of a judge of the district court, direct the probation service of the court to conduct a presentence investigation on that person and render a report to the magistrate prior to the imposition of sentence.

(b) The probation laws shall be applicable to persons tried by a magistrate under this section, and such officer shall have power to grant probation and to revoke or reinstate the probation of any person granted probation by him.

Rule 11. Appeal.

(*a*) *Notice of appeal.*—An appeal shall be taken within ten days after entry of judgment of conviction. An appeal shall be taken by filing with the United States magistrate a notice in duplicate stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

(*b*) *Record.*—The United States magistrate shall forward to the clerk of the district court the duplicate notice of appeal together with a transcript, tape, or other recording of the proceedings; his docket entries and copies of the complaint, the warrant, the defendant's written consent to be tried before the United States magistrate, and any order concerning bail pending appeal,

certified under his hand and seal. These shall constitute the record on appeal.

(*c*) *Transcript.*—Within ten days after the filing of the notice of appeal, the appellant shall order from the United States magistrate a transcript of such part of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within ten days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements for payment of the cost of the transcript unless an affidavit is made that he is unable to pay or give security therefor, in which case it shall be at the expense of the United States as provided for in 18 U. S. C. § 3401 (e).

(*d*) *Stay of execution.*

(*1*) *Imprisonment.*—A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. If the defendant is not admitted to bail, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is

to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the district court.

(*2*) *Fine.*—A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(*3*) *Probation.*—An order placing the defendant on probation shall be stayed if an appeal is taken.

(*e*) *Bail.*—Admission to bail shall be as provided for in 18 U. S. C. § 3148.

(*f*) *Scope of appeal.*—The defendant shall not be entitled to a trial *de novo* in the district court. The scope of appeal shall be the same as an appeal from a judgment of a district court to a United States court of appeals.

Rule 12. New trial.

The United States magistrate, on motion of a defendant, may grant a new trial to him if required in the interest of justice. The United States magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within six months after final judgment, but if an appeal is pending the United States magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven days after a finding of guilty or within such further time as the court may fix during the seven-day period.

Rule 13. Correction or reduction of sentence.

The United States magistrate may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The United States magistrate may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the United States magistrate of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The United States magistrate may also reduce a sentence upon revocation of probation as provided by law.

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STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1966, 1967, AND 1968

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1966	1967	1968	1966	1967	1968	1966	1967	1968	1966	1967	1968
Number of cases on dockets	13	10	9	1,469	1,540	1,559	1,874	2,036	2,350	3,356	3,586	3,918
Number disposed of during terms	5	2	0	1,232	1,338	1,288	1,666	1,633	1,863	2,903	2,973	3,151
Number remaining on dockets	8	8	9	237	202	271	208	403	487	453	613	767

	TERMS		
	1966	1967	1968
Distribution of cases disposed of during terms:			
Original cases	5	2	0
Appellate cases on merits	310	359	305
Petitions for certiorari	922	979	983
Miscellaneous docket applications	1,666	1,633	1,863

	TERMS		
	1966	1967	1968
Distribution of cases remaining on dockets:			
Original cases	8	8	9
Appellate cases awaiting argument	68	65	72
Appellate cases pending	169	137	199
Miscellaneous docket applications	208	403	487

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1. *Clayton Act—Divestiture—District Court's decree.*—District Court's decree does not comply with this Court's mandate. Allocation of gas reserves must place the New Company in same relative competitive position in California market *vis-à-vis* El Paso as Pacific Northwest occupied before the merger. In order to accomplish complete divestiture which this Court mandated all managerial and financial connections between El Paso and the New Company must be severed and there must be a cash sale of Northwest Division. Utah Comm'n v. El Paso Gas Co., p. 464.

2. *Clayton Act—Injunctive relief—Threat of injury.*—Injunctive relief under § 16 of the Act is available even though plaintiff has not suffered actual injury as long as he demonstrates a significant threat of injury from an impending antitrust violation or from a contemporary violation likely to continue or recur. Zenith Corp. v. Hazeltine, p. 100.

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4. *Sherman Act—Patent licenses—Misuse of patents.*—Matter is remanded to Court of Appeals to consider whether trial court correctly determined that respondent conditioned grant of licenses on payment of royalties on unpatented products, and, if so, whether such misuse embodies the ingredients of violation of either § 1 or § 2 of the Act, or whether petitioner was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. Zenith Corp. v. Hazeltine, p. 100.

5. *Treble-damage suit—Gasoline sales to Branded Dealers and wholesalers—Price discrimination.*—Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, applies to respondent's price discriminations (charging higher prices to petitioner than to respondent's Branded Dealers and to a wholesaler whose gas was sold to a subsidiary, which in turn sold to its subsidiary, a major competitor of petitioner), which are not immunized from coverage under the statute simply because the product passed through additional formal exchanges before reaching petitioner's actual competitor. Perkins v. Standard Oil Co., p. 642.

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1. *Place of entertainment—Racial discrimination.*—Lake Nixon Club is covered accommodation under §§ 201 (b)(3) and 201 (c)(3) as it is "place of entertainment," which, in light of the overriding purpose of Title II to remove discriminatory denials of access to public facilities, includes recreational areas and is not, as respondent argues, limited to spectator entertainment. Daniel v. Paul, p. 298.

2. *Private club—Membership club.*—Lake Nixon Club, as courts below correctly held, is not a private club since it routinely affords "membership" to all whites and has none of the attributes of self-government and member-ownership traditionally associated with private clubs. Daniel v. Paul, p. 298.

3. *Public accommodation—Snack bar.*—Lake Nixon Club's snack bar is "place of public accommodation" under § 201 (b)(2) since it is "principally engaged in selling food for consumption on the premises." The snack bar's status as a covered establishment automatically brings the entire Club facility within the coverage of Title II by virtue of §§ 201 (b)(4) and 201 (c)(4). Daniel v. Paul, p. 298.

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I. Courts-Martial.

Fifth Amendment—Civilian trials.—Art. I, § 8, cl. 14, of the Constitution recognizes that military discipline requires military courts in which not all the procedural safeguards of Art. III trials need apply, and the Fifth Amendment exempts "cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment and the right to jury trial. O'Callahan v. Parker, p. 258.

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II. Double Jeopardy.

1. *Enforceable against States—Retrial on two offenses after acquittal on one.*—Double jeopardy provision of Fifth Amendment is enforceable against the States through the Fourteenth Amendment. *Palko* v. *Connecticut*, 302 U. S. 319, overruled. Petitioner's conviction for larceny (of which he had been acquitted at his first trial) cannot stand, since "[c]onditioning an appeal on one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." Benton v. Maryland, p. 784.

2. *Resentencing—Credit for time served.*—Basic Fifth Amendment guarantee against double jeopardy, enforceable against the States by the Fourteenth Amendment, is violated when punishment already exacted for an offense is not fully "credited" in imposing a new sentence for the same offense. North Carolina v. Pearce, p. 711.

3. *Retrial—Length of sentence.*—Guarantee against double jeopardy does not restrict length of sentence upon reconviction, the power to impose whatever sentence is legally authorized being a corollary of the well-established power to retry a defendant whose conviction has been set aside for an error in the previous proceeding. North Carolina v. Pearce, p. 711.

III. Due Process.

1. *Guilty plea—Presumption of waivers—Silent record.*—Waiver of privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by the Fourteenth; of the right to trial by jury; and the right to confront one's accusers—all of which are involved when a guilty plea is entered in a state criminal trial—cannot be presumed from a silent record. Acceptance of the guilty plea under the circumstances of this case constituted reversible error because the record does not disclose that petitioner voluntarily and understandingly entered his plea. Boykin v. Alabama, p. 238.

2. *Increased sentence after retrial—Reasons shown affirmatively.*—Due process requires that vindictiveness must play no part in the sentence a defendant receives after a new trial and that he be freed of any apprehension of retaliatory motivation on part of sentencing judge. Reasons for imposition after retrial of more severe sentence must affirmatively appear in the record and must be based on objective information concerning defendant's identifiable conduct after the original sentencing proceeding. North Carolina v. Pearce, p. 711.

CONSTITUTIONAL LAW—Continued.

3. *Louisiana's Labor-Management Commission of Inquiry—Criminal investigations.*—Three-judge District Court's dismissal of complaint by labor union member seeking declaratory and injunctive relief challenging as violative of due process and equal protection Louisiana statute creating Labor-Management Commission of Inquiry for investigating and finding facts relating to violations of state or federal criminal laws in labor-management relations field, is reversed and remanded. Jenkins v. McKeithen, p. 411.

4. *Prejudgment garnishment—Wages.*—Wisconsin's prejudgment garnishment procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of due process. Sniadach v. Family Finance Corp., p. 337.

5. *Statutory presumption—Possession of marihuana.*—In this case, the application of that part of the presumption in 21 U. S. C. § 176 (a) which provides that a possessor of marihuana is deemed to know of its unlawful importation denied petitioner due process of law. Leary v. United States, p. 6.

6. *Statutory presumptions.*—Criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. United States, p. 6.

IV. Equal Protection of the Laws.

1. *Franchise limitation in bond elections—Prospectivity of decision.*—The decision in this case, holding unconstitutional the "property taxpayer" limitation on voting in election called to approve issuance of bonds for municipal utility system, will have prospective effect, and will apply only where the time for challenging election result has not expired, or in cases brought within time specified for challenging election and which are not yet final. Cipriano v. City of Houma, p. 701.

2. *Free transcripts—Appeal "as matter of right"—Petty offenses.*—Denial to petitioner, an indigent who was convicted of drunken driving, of copy at public expense of the trial transcript which he needed to perfect an appeal, to which he was entitled "as a matter of right" under Oklahoma law, is a violation of the Fourteenth Amendment. Williams v. Oklahoma City, p. 458.

3. *Property taxpayers—Election to approve bonds.*—"Property taxpayer" limitation on voting in election called to approve issuance of revenue bonds by municipal utility system in Louisiana violates the Equal Protection Clause of the Fourteenth Amendment. Cipriano v. City of Houma, p. 701.

CONSTITUTIONAL LAW—Continued.

4. *School district elections—Denial of franchise.*—Where state statute grants right to vote to some bona fide residents of requisite age and citizenship and denies franchise to others, it must be determined whether the exclusions are necessary to promote a compelling state interest, and assuming that New York legitimately might limit the franchise in school district elections to "those primarily interested in school affairs," the classifications in the statute do not accomplish this purpose with sufficient precision to justify denying the franchise to appellant and members of his class. Kramer v. Union School District, p. 621.

5. *Sentence on retrial—Classification.*—Imposition of a more severe sentence upon retrial does not violate the Equal Protection Clause of the Fourteenth Amendment since there is no invidious "classification" of those successfully seeking new trials. North Carolina v. Pearce, p. 711.

V. Freedom of Speech.

1. *Broadcasting—Fairness doctrine.*—The Federal Communications Commission's fairness doctrine and its specific manifestations in the personal attack and political editorial rules do not violate the First Amendment. The Amendment is relevant to public broadcasting, but it is the right of the viewing and listening public and not the right of the broadcasters which is paramount; and the Amendment does not protect private censorship by broadcasters who are licensed by the Government to use a scarce resource which is denied to others. Red Lion Broadcasting Co. v. FCC, p. 367.

2. *Employer and employees—Threats or promises.*—Employer's free speech right to communicate with his employees is firmly established and cannot be infringed by a union or the NLRB, and § 8 (c) of the National Labor Relations Act merely implements the First Amendment by requiring that the expression of "any views, argument or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8 (a)(1). NLRB v. Gissel Packing Co., p. 575.

3. *Ohio's criminal syndicalism statute—Mere advocacy.*—Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid assembly with others merely to advocate described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Brandenburg v. Ohio, p. 444.

CONSTITUTIONAL LAW—Continued.

VI. Just Compensation.

Riot damage—Panama Canal Zone.—The Fifth Amendment does not require that petitioners be compensated for damages to their buildings resulting from misconduct by rioters following occupation of the buildings by government troops. Where a private party is the intended beneficiary of governmental activity, "fairness and justice" do not require that the losses which may result therefrom "be borne by the public as a whole," even though the activity may also be intended to benefit the public. YMCA v. United States, p. 85.

VII. Search and Seizure.

1. *Incident to arrest—Extent of search.*—An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may search area "within [the] immediate control" of person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence; but for the routine search of rooms other than that in which an arrest occurs, or for searching desk drawers or other closed or concealed areas in that room, absent well-recognized exceptions, a search warrant is required. Chimel v. California, p. 752.

2. *Incident to arrest—Place of arrest—Extent of search.*—It is not necessary to decide if *Chimel* v. *California, ante,* p. 752, applies retroactively, the search clearly having violated the Fourth Amendment as made applicable to the States by the Fourteenth, since it has never been constitutionally permissible for the police, absent an emergency, to arrest a person *outside* his home and then take him inside for the purpose of conducting a warrantless search. Shipley v. California, p. 818.

3. *Warrantless search — Incident to arrest — Extent of search.* — Where petitioner was arrested on third floor of 16-room house and police, without a search warrant, then searched the entire house and seized several thousand articles, it is not necessary to decide whether *Chimel* v. *California, ante,* p. 752, applies retroactively, as scope of the search and seizures was "beyond the sanction of any" previous decision. Von Cleef v. New Jersey, p. 814.

VIII. Self-Incrimination.

1. *Marihuana Tax Act—Waiver.*—Petitioner's invocation of the privilege against self-incrimination under the Fifth Amendment provided a full defense to the charge of violating 26 U. S. C. § 4744 (a)(2) of the Marihuana Tax Act, and his failure to assert the privilege at trial did not constitute a waiver. Leary v. United States, p. 6.

CONSTITUTIONAL LAW—Continued.

2. *Marihuana Tax Act—Waiver.*—The Fifth Amendment privilege provides a complete defense to prosecution under the Act if the defendant's plea of self-incrimination is timely, the defendant confronts a substantial risk of self-incrimination by complying with the Act's terms, and he has not waived the privilege. United States v. Covington, p. 57.

IX. Sixth Amendment.

Confrontation Clause—Codefendants' confessions.—Apart from the cumulative evidence of the confessions of the two codefendants who did not take the stand, the evidence against petitioner was so overwhelming that the violation of *Bruton* v. *United States*, 391 U. S. 123 (which held that the admission of a confession of a codefendant who did not take the stand deprived the defendant of his rights under the Sixth Amendment's Confrontation Clause), was harmless beyond a reasonable doubt. Harrington v. California, p. 250.

X. Speech or Debate Clause.

Suit against Congressmen—Legislative employees.—Although the Speech or Debate Clause bars action against respondent Congressmen brought by, *inter alios*, elected Congressman who was excluded from the House, it does not bar action against the other respondents, who are legislative employees charged with unconstitutional activity; and the fact that House employees are acting pursuant to express orders of the House does not preclude judicial review of the constitutionality of the underlying legislative decision. Powell v. McCormack, p. 486.

CONTEMPT. See **Sentences.**

CONTINENTAL SHELF. See **Admiralty; Outer Continental Shelf Lands Act.**

CONTRACTS. See **Patents**, 1–3.

CONTRIBUTORY NEGLIGENCE. See **Federal Safety Appliance Act.**

CONTROVERSIAL ISSUES. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

COUNSEL. See **Appeals; Evidence; Procedure**, 1–3.

COUPLING DEVICES. See **Federal Safety Appliance Act.**

COURT OF APPEALS' RULES. See **Appeals; Procedure**, 2–3.

COURT OF CLAIMS. See **Jurisdiction**, 2.

COURT OF MILITARY APPEALS. See **Habeas Corpus; Military Appeals; Mootness**, 2.

COURT ORDERS. See **School Desegregation.**

COURTS. See **Constitutional Law,** I; X; **Habeas Corpus; Jurisdiction,** 3, 5; **Justiciability,** 1–2; **Military Appeals; Mootness,** 1–2.

COURTS-MARTIAL. See also **Constitutional Law,** I; **Habeas Corpus; Jurisdiction,** 3; **Military Appeals; Mootness,** 2.

Criminal law — Civilian trials — Service-connected offenses. — A crime, to be under military jurisdiction, must be service connected, and since petitioner's crimes were not, he could not be tried by court-martial but was entitled to civilian trial, with benefits of indictment by grand jury and jury trial. O'Callahan v. Parker, p. 258.

CREDIT FOR TIME SERVED. See **Constitutional Law,** II, 2–3; III, 2; IV, 5; **Procedure,** 6.

CREDITORS. See **Constitutional Law,** III, 4; **Garnishment.**

CREWMEN. See **Immigration and Nationality Act,** 1–2.

CRIMINAL CONTEMPT. See **Sentences.**

CRIMINAL LAW. See **Appeals; Constitutional Law,** I–II; III, 1–2, 5–6; IV, 2, 5; V, 3; VII–IX; **Courts-Martial; Evidence; Federal Rules of Criminal Procedure; Jurisdiction,** 1, 3–4; **Procedure,** 1–6; **Selective Service Act,** 1–2; **Waivers.**

CRIMINAL SYNDICALISM. See **Constitutional Law,** V, 3.

CROSS-EXAMINATION. See **Constitutional Law,** III, 3.

CUSTOMS SEARCH. See **Constitutional Law,** III, 5–6; VIII, 1.

DAMAGES. See **Admiralty; Antitrust Acts,** 2–5; **Federal Safety Appliance Act; Judgments; Outer Continental Shelf Lands Act; Patent Licenses; Removal.**

DAMAGE TO BUILDINGS. See **Constitutional Law,** VI.

DEATH ON THE HIGH SEAS ACT. See **Admiralty; Outer Continental Shelf Lands Act.**

DEATH PENALTY. See **Constitutional Law,** III, 1; **Jurisdiction,** 4; **Waivers.**

DEBTOR AND CREDITOR. See **Constitutional Law,** III, 4; **Garnishment.**

DECEDENTS' ESTATES. See **Taxes.**

DECLARATORY JUDGMENTS. See **Constitutional Law,** IV, 1, 3; **Jurisdiction,** 2.

DECLARATORY RELIEF. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

DECREES. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

DEFENSES. See **Constitutional Law**, VIII, 2; **Federal Rules of Criminal Procedure**; **Federal Safety Appliance Act**; **Patents**, 1–3; **Procedure**, 4; **Selective Service Act**, 1–2.

DEPORTATION. See **Immigration and Nationality Act**, 1–2.

DEPRIVATION OF PROPERTY. See **Constitutional Law**, VI.

DESEGREGATION. See **School Desegregation.**

DESTRUCTIBLE EVIDENCE. See **Constitutional Law**, VII, 1.

DESTRUCTION OF PROPERTY. See **Constitutional Law**, VI.

DEVICES. See **Voting Rights Act of 1965**, 1–3.

DISABILITY RETIREMENT. See **Jurisdiction**, 2.

DISCIPLINE. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

DISCRIMINATION. See **Civil Rights Act of 1964**, 1–3; **School Desegregation**; **Voting Rights Act of 1965**, 1–3.

DISCRIMINATORY PRICING. See **Antitrust Acts**, 5.

DISTRICT COURTS. See **School Desegregation.**

DISTRICT DIRECTOR OF IMMIGRATION. See **Immigration and Nationality Act**, 1–2.

DIVERSITY ACTIONS. See **Federal Safety Appliance Act.**

DIVESTITURE DECREES. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

DOMESTIC PATENTS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

DOMICILIARIES. See **Soldiers' and Sailors' Civil Relief Act.**

DOORKEEPER. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

DOUBLE JEOPARDY. See **Constitutional Law**, II; **Jurisdiction**, 1; **Procedure**, 6.

DRILLING RIGS. See **Admiralty**; **Outer Continental Shelf Lands Act.**

DRUGS. See **Appeals**; **Constitutional Law**, III, 5–6; VIII, 1–2; **Procedure**, 2–3, 5.

DRUNKEN DRIVING. See **Constitutional Law**, IV, 2.

DUAL SCHOOL SYSTEM. See **Voting Rights Act of 1965**, 1–3.

DUE PROCESS. See **Constitutional Law**, III; **Garnishment**; **Jurisdiction**, 4; **Procedure**, 1, 6; **Waivers.**

EDUCATION DISCRIMINATION. See **Voting Rights Act of 1965**, 1–3.

EDUCATION LAW. See **Constitutional Law**, IV, 4.

ELECTIONS. See **Constitutional Law**, IV, 1, 3–4; V, 2; X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1; **National Labor Relations Act**, 1–4; **Voting Rights Act of 1965**, 1–3.

ELIGIBILITY TO VOTE. See **Constitutional Law**, IV, 1, 3–4.

EMPLOYEES OF CONGRESS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

EMPLOYER AND EMPLOYEES. See **Constitutional Law**, III, 4; V, 2; **Federal Safety Appliance Act**; **Garnishment**; **National Labor Relations Act**, 1–4.

ENGLISH PATENT POOLS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

ENTERTAINMENT. See **Civil Rights Act of 1964**, 1–3.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, IV; **Procedure**, 6; **School Desegregation.**

ERROR. See **Appeals**; **Constitutional Law**, III, 1; IX; **Jurisdiction**, 4; **Procedure**, 2–3, 5; **Voting Rights Act of 1965**, 1–3; **Waivers.**

ESTATES AND TRUSTS. See **Taxes.**

ESTATE TAXES. See **Taxes.**

ESTOPPEL. See **Patents**, 1–3.

EVIDENCE. See also **Antitrust Acts**, 2–4; **Constitutional Law**, III, 3; IX; **Judgments**; **Patent Licenses**; **Procedure**, 1, 5; **Voting Rights Act of 1965**, 1–3.

Admissibility of in-custody statements—Retrials—Prospectivity of Miranda case.—Standards which this Court established in *Miranda* v. *Arizona*, 384 U. S. 436, for determining admissibility into evidence of in-custody statements do not apply to persons whose retrials have commenced after the date of that decision if their original trials had begun before that date. Jenkins v. Delaware, p. 213.

EXCLUSION. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

EXCLUSIVE BARGAINING REPRESENTATIVE. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

EXECUTIVE TRIAL AGENCY. See **Constitutional Law**, III, 3.

EXEMPTIONS. See **Jurisdiction**, 2; **Selective Service Act**, 1–2; **Soldiers' and Sailors' Civil Relief Act.**

EXHAUSTION OF REMEDIES. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2; **Selective Service Act**, 1–2.

EXPERTISE. See **Selective Service Act**, 1–2.

EXPIRATION OF SENTENCE. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

EXPORTS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

EXPULSION. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

EXTENT OF SEARCH. See **Constitutional Law**, VII, 1–3.

FACULTY INTEGRATION. See **School Desegregation.**

FAILURE TO REPORT. See **Selective Service Act**, 1–2.

FAIRNESS DOCTRINE. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

FALSE CHARGES. See **Constitutional Law**, III, 3.

"FAMILY UNIT." See **Selective Service Act**, 1–2.

FEDERAL COMMUNICATIONS COMMISSION. See also **Constitutional Law**, V, 1.

Fairness doctrine—Personal attack—Public interest.—The fairness doctrine is within the authority of the Commission. The doctrine began shortly after the Federal Radio Commission was established to allocate frequencies among competing applicants in the public interest, and insofar as there is an affirmative obligation of the broadcaster to see that both sides are presented, the personal attack doctrine and regulations do not differ from the fairness doctrine. Red Lion Broadcasting Co. v. FCC, p. 367.

FEDERAL COURTS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Federal Safety Appliance Act.**

FEDERAL ENCLAVES. See **Admiralty**; **Outer Continental Shelf Lands Act.**

FEDERAL OFFICIALS. See **Removal.**

FEDERAL PRISONERS. See **Removal.**

FEDERAL QUESTION. See **Constitutional Law,** III, 1; **Jurisdiction,** 4; **Waivers.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Antitrust Acts,** 2–4; **Judgments; Patent Licenses.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Constitutional Law,** VIII, 2; **Procedure,** 4.

Rule 12 (b) (1)—Dismissal of indictment—Marihuana Tax Act.—Here, where illegality of appellee's possession of marihuana appears to have been acknowledged by the Government and there was no factual dispute about the timeliness of appellee's plea or claim that he had waived his privilege, appellee's defense was "capable of determination without the trial of the general issue," under Rule 12 (b) (1), and the District Court was justified in granting motion to dismiss the indictment. United States v. Covington, p. 57.

FEDERAL SAFETY APPLIANCE ACT.

Nonemployee of railroad—Suit in state court—Defenses.—In accordance with consistent interpretation of the statutory scheme, nonemployee must look for his remedy to common-law tort action, and, in absence of diversity, must sue in state court; and the definition of causation and the availability of defenses of assumption of risk and contributory negligence are left to state law. Crane v. Cedar Rapids & I. C. R. Co., p. 164.

FEDERAL-STATE RELATIONS. See **Admiralty; Constitutional Law,** III, 1, 3; **Federal Safety Appliance Act; Jurisdiction,** 4; **Outer Continental Shelf Lands Act; Patents,** 1–3; **Removal; Waivers.**

FIFTH AMENDMENT. See **Constitutional Law,** I; II, 2–3; III, 2, 5–6; IV, 5; VI; VIII, 1–2; **Courts-Martial; Federal Rules of Criminal Procedure; Jurisdiction,** 3–4; **Procedure,** 4–5; **Waivers.**

FIRST AMENDMENT. See **Constitutional Law,** V; **Federal Communications Commission; National Labor Relations Act,** 1–4.

FOOD SALES. See **Civil Rights Act of 1964,** 1–3.

FOREIGN MARIHUANA. See **Constitutional Law,** III, 5–6; VIII, 1.

FOREIGN PATENT POOLS. See **Antitrust Acts,** 2–4; **Judgments; Patent Licenses.**

FOREIGN TRADE. See **Antitrust Acts,** 2–4; **Judgments; Patent Licenses.**

FORMAL SALES. See **Antitrust Acts**, 5.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 1–3; III, 1–4; IV, 1–5; V, 3; VII, 1–3; IX; **Garnishment**; **Jurisdiction**, 4; **Procedure**, 5–6; **School Desegregation.**

FOURTH AMENDMENT. See **Constitutional Law**, VII.

FRANCHISE. See **Constitutional Law**, IV, 1, 3–4.

FREEDOM OF SPEECH. See **Constitutional Law**, V; **Federal Communications Commission**; **National Labor Relations Act**, 1–4.

FREE TRANSCRIPTS. See **Constitutional Law**, IV, 2.

FREIGHT CARS. See **Federal Safety Appliance Act.**

FREQUENCY SPECTRUM. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

GARNISHMENT. See also **Constitutional Law**, III, 4.

Prejudgment garnishment — Wages — Due process. — Wisconsin's prejudgment garnishment procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of due process. Sniadach v. Family Finance Corp., p. 337.

GASOLINE. See **Antitrust Acts**, 5.

GAS RESERVES. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

GASTON COUNTY. See **Voting Rights Act of 1965**, 1–3.

"GOOD FAITH" DOUBT. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

GRAND JURIES. See **Constitutional Law**, I; **Courts-Martial**; **Jurisdiction**, 3.

GUILTY PLEAS. See **Constitutional Law**, III, 1; **Jurisdiction**, 4; **Waivers.**

GYROSCOPES. See **Patents**, 1–3.

HABEAS CORPUS. See also **Appeals**; **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Military Appeals**; **Mootness**, 2; **Procedure**, 2–3, 6.

Military appeals—Exhaustion of military remedies—Confinement pending review.—Habeas corpus petitions from military prisoners should not be entertained by civilian courts until all available remedies within the military court system have been exhausted, and since this principle applies with equal force to ancillary matters such as legality of petitioner's confinement pending completion of military review, petitioner's failure to exhaust his remedy in Court of Military Appeals forecloses relief requested here. Noyd v. Bond, p. 683.

HARMLESS ERROR. See **Constitutional Law,** IX; **Procedure,** 5.

HEARINGS. See **Appeals; Constitutional Law,** III, 3–4; **Garnishment; Immigration and Nationality Act,** 1–2; **Procedure,** 2–3; **School Desegregation.**

HIGH SEAS. See **Admiralty; Outer Continental Shelf Lands Act.**

HOUSE OF REPRESENTATIVES. See **Constitutional Law,** X; **Jurisdiction,** 5; **Justiciability,** 1–2; **Mootness,** 1.

HOUSE RESOLUTIONS. See **Constitutional Law,** X; **Jurisdiction,** 5; **Justiciability,** 1–2; **Mootness,** 1.

HOUSES. See **Constitutional Law,** VII, 3.

ILLEGAL IMPORTATION. See **Constitutional Law,** III, 5–6; VIII, 1.

IMMIGRATION AND NATIONALITY ACT.

1. *Alien crewman—Request for asylum—Procedure.*—Applicable procedure governing request for asylum made by Yugoslav crewman against whom proceedings under § 252 (b) of the Act have been instituted was one set forth in 8 CFR § 253.1 (e), which was promulgated under the Attorney General's statutory power to act upon alien's request for asylum. Alien crewman, whose temporary landing permit is properly revoked pursuant to § 252 (b) is not entitled to § 242 (b) hearing merely because deportation is not arranged or effected when his ship leaves. Immigration Service v. Stanisic, p. 62.

2. *Deportation of alien—Political persecution.*—Since the Attorney General is authorized by amendment to § 243 (h) of the Act made after respondent's January 1965 hearing before the District Director to withhold deportation of an alien found to be subject to "persecution on account of race, religion, or political opinion," and not just "physical persecution," case is remanded for new hearing before the District Director. Immigration Service v. Stanisic, p. 62.

IMMUNITY. See **Removal.**

IMPORTATION OF MARIHUANA. See **Constitutional Law,** III, 5–6; VIII, 1.

IMPROVEMENT PATENTS. See **Patents,** 1–3.

INADEQUATE RECORD. See **Constitutional Law,** III, 1; **Jurisdiction,** 4; **Waivers.**

INCIDENT TO ARREST. See **Constitutional Law,** VII, 1–3.

INCITING LAWLESS ACTION. See **Constitutional Law,** V, 3.

INCOME TAXES. See **Jurisdiction,** 2.

INCREASED SENTENCES. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 6.

IN-CUSTODY STATEMENTS. See **Evidence**; **Procedure**, 1.

INDICTMENTS. See **Constitutional Law**, I; VIII, 2; **Courts-Martial**; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 3; **Procedure**, 4.

INDIGENTS. See **Appeals**; **Constitutional Law**, IV, 2; **Procedure**, 2–3.

INDUCTION. See **Selective Service Act**, 1–2.

INFERIOR SCHOOLS. See **Voting Rights Act of 1965**, 1–3.

IN FORMA PAUPERIS. See **Appeals**; **Procedure**, 2–3.

INFRINGEMENT SUITS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

INJUNCTIONS. See **Antitrust Acts**, 2–4; **Constitutional Law**, X; **Judgments**; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1; **Patent Licenses**; **Sentences.**

INJURY. See **Constitutional Law**, III, 3.

INSTRUCTIONS TO JURY. See **Constitutional Law**, III, 5–6; VIII, 1.

INTEGRATION. See **School Desegregation.**

INTENT. See **Taxes.**

INTERNAL REVENUE CODE. See **Taxes.**

INTERNAL REVENUE SERVICE. See **Constitutional Law**, III, 5–6; VIII, 1.

INTERRELATED TRUSTS. See **Taxes.**

INTERROGATIONS. See **Evidence**; **Procedure**, 1.

INTERRUPTION OF SENTENCE. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

INTERSTATE COMMERCE. See **Civil Rights Act of 1964**, 1–3.

INTERSTATE RAILROADS. See **Federal Safety Appliance Act.**

INTERSTATE TRAVELERS. See **Civil Rights Act of 1964**, 1–3.

INTRAFAMILY TRANSFERS. See **Taxes.**

INVALIDITY OF PATENTS. See **Patents**, 1–3.

INVENTORS. See **Patents**, 1–3.

INVESTIGATORY COMMISSIONS. See **Constitutional Law**, III, 3.

IOWA. See **Federal Safety Appliance Act.**

ISLANDS. See **Admiralty; Outer Continental Shelf Lands Act.**

JEWELRY. See **Constitutional Law,** VII, 2.

JUDGES. See **Constitutional Law,** II, 2–3; III, 2; IV, 5; **Procedure,** 6.

JUDGE'S INSTRUCTIONS. See **Constitutional Law,** III, 5–6; VIII, 1.

JUDGING QUALIFICATIONS. See **Constitutional Law,** X; **Jurisdiction,** 5; **Justiciability,** 1–2; **Mootness,** 1.

JUDGMENTS. See also **Antitrust Acts,** 2–4; **Patent Licenses.**

In personam judgments—Not party to suit—Stipulation.—One is not bound by judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made party by service of process. The judgments against Hazeltine were properly vacated as it was not named as a party or served, did not formally appear at trial, and the pretrial stipulation by its subsidiary that parent and subsidiary be considered as one entity for purposes of the litigation was not an adequate substitute for the normal means of obtaining jurisdiction over Hazeltine. Zenith Corp. v. Hazeltine, p. 100.

JUDICIAL REVIEW. See **Selective Service Act,** 1–2.

JUKE BOXES. See **Civil Rights Act of 1964,** 1–3.

JURISDICTION. See also **Admiralty; Antitrust Acts,** 1–4; **Appeals; Constitutional Law,** III, 1; X; **Courts-Martial; Federal Rules of Criminal Procedure; Federal Safety Appliance Act; Judgments; Justiciability,** 1–2; **Mootness,** 1; **Outer Continental Shelf Lands Act; Patent Licenses; Procedure,** 2–3; **Waivers.**

1. *Concurrent sentence doctrine—Larceny and burglary convictions—Acquittal at first trial.*—Concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States,* 320 U. S. 81, 105, does not constitute a jurisdictional bar to this Court's deciding petitioner's challenge to his conviction for larceny (of which he had been acquitted at his first trial), since the possibilities of adverse collateral effects to him from that conviction give the case an adversary cast and make it justiciable. Benton v. Maryland, p. 784.

2. *Court of Claims—Declaratory judgments—Money claims.*—Court of Claims' jurisdiction is limited to money claims against the United States and that court does not have the authority to issue declaratory judgments. United States v. King, p. 1.

JURISDICTION—Continued.

3. *Courts-martial—Service-connected offenses—Civilian trials.*—A crime, to be under military jurisdiction, must be service connected, and since petitioner's crimes were not, he could not be tried by court-martial but was entitled to civilian trial, with benefits of indictment by grand jury and jury trial. O'Callahan v. Parker, p. 258.

4. *Supreme Court—Alabama automatic appeal statute—Voluntariness of guilty plea.*—This Court has jurisdiction to review the voluntariness question since the plain error of trial judge's acceptance of petitioner's guilty plea absent an affirmative showing that the plea was intelligent and voluntary was before the state court under the Alabama automatic appeal statute. Boykin v. Alabama, p. 238.

5. *Supreme Court—Exclusion of Congressman-elect—Case arising under Constitution.*—The Court has subject matter jurisdiction over petitioners' action requesting declaratory relief for Powell's exclusion from the House of Representatives, as the case is one "arising under" the Constitution within the meaning of Art. III. Powell v. McCormack, p. 486.

6. *Supreme Court—Motion to dismiss appeal—Rule 60.*—Filing of motion under Rule 60 to dismiss appeal does not deprive this Court of jurisdiction to determine whether mandate it issued in this case has been complied with. Utah Comm'n v. El Paso Gas Co., p. 464.

JURISDICTIONAL STATEMENT. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

JURY TRIALS. See **Constitutional Law**, I; **Courts-Martial**; **Jurisdiction**, 3; **Sentences.**

JUST COMPENSATION. See **Constitutional Law**, VI.

JUSTICIABILITY. See also **Constitutional Law**, II, 1; X; **Jurisdiction**, 1, 5; **Mootness**, 1.

1. *Exclusion of Congressman—Judicial remedy—Declaratory relief.*—This litigation is justiciable because claim presented and relief sought can be judicially resolved. If petitioners are correct, House had duty to seat Powell once it determined that he met Constitution's standing qualifications, and relief sought is susceptible of judicial resolution, since regardless of appropriateness of coercive remedy against House personnel (not decided here) declaratory relief is independently available. Powell v. McCormack, p. 486.

2. *Political question—Exclusion of Congressman-elect—Separation of powers.*—This case does not involve a "political question," which

JUSTICIABILITY—Continued.
under the separation-of-powers doctrine would not be justiciable. The Court's examination of historical materials shows at most that Congress' power under Art. I, § 5, to judge the "Qualifications of its Members" is a "textually demonstrable constitutional commitment . . . to [that] co-ordinate political department of government" to judge only standing qualifications expressly set forth in the Constitution; hence the House has no power to exclude a member-elect who meets the Constitution's membership requirements. Powell v. McCormack, p. 486.

KU KLUX KLAN. See **Constitutional Law**, V, 3.

LABOR. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

LABOR-MANAGEMENT COMMISSION OF INQUIRY. See **Constitutional Law**, III, 3.

LABOR UNIONS. See **Constitutional Law**, III, 3.

LAKE NIXON CLUB. See **Civil Rights Act of 1964**, 1–3.

LANDING PERMITS. See **Immigration and Nationality Act**, 1–2.

LARCENY. See **Constitutional Law**, II, 1; **Jurisdiction**, 1.

LAWLESS ACTION. See **Constitutional Law**, V, 3.

LEGISLATIVE EMPLOYEES. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

LENGTH OF SENTENCES. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 6.

LICENSE AGREEMENTS. See **Patents**, 1–3.

LICENSEE ESTOPPEL. See **Patents**, 1–3.

LICENSEES. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

LICENSES. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

LIFE ESTATES. See **Taxes.**

LITERACY TESTS. See **Voting Rights Act of 1965**, 1–3.

LITTLE ROCK. See **Civil Rights Act of 1964**, 1–3.

LOCAL BOARDS. See **Selective Service Act**, 1–2.

LONGER SENTENCES. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 6.

LONGEVITY. See **Jurisdiction**, 2.

LOUISIANA. See **Admiralty**; **Constitutional Law**, III, 3; IV, 1, 3; **Outer Continental Shelf Lands Act.**

MAJORITY STATUS. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

MANAGEMENT DECISIONS. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

MANDATES. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

MANUAL FOR COURTS-MARTIAL. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

MARIHUANA. See **Constitutional Law**, III, 5–6; VIII, 1–2; **Federal Rules of Criminal Procedure**; **Procedure**, 4.

MARIHUANA TAX ACT. See **Constitutional Law**, III, 5–6; VIII, 1–2; **Federal Rules of Criminal Procedure**; **Procedure**, 4.

MARITIME LAW. See **Admiralty**; **Outer Continental Shelf Lands Act.**

MARKET EXCLUSION. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

MARYLAND. See **Constitutional Law**, II, 1; **Jurisdiction**, 1.

MEDICAL OFFICERS. See **Removal.**

MEMBERSHIP CLUBS. See **Civil Rights Act of 1964**, 1–3.

MEMBERS OF CONGRESS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

MERCHANT SHIPS. See **Immigration and Nationality Act**, 1–2.

MERGERS. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

MEXICO. See **Constitutional Law**, III, 5–6; VIII, 1.

MILITARY APPEALS. See also **Habeas Corpus**; **Mootness**, 2.

Habeas corpus—Civilian courts—Exhaustion of military remedies.—Habeas corpus petitions from military prisoners should not be entertained by civilian courts until all available remedies within the military court system have been exhausted, and since this principle applies with equal force to ancillary matters such as legality of petitioner's confinement pending completion of military review, petitioner's failure to exhaust his remedy in Court of Military Appeals forecloses relief requested here. Noyd v. Bond, p. 683.

MILITARY DISCIPLINE. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

MILITARY OCCUPATION. See **Constitutional Law**, VI.

MILITARY PERSONNEL. See **Constitutional Law**, I; **Courts-Martial**; **Habeas Corpus**; **Jurisdiction**, 2–3; **Military Appeals**; **Mootness**, 2; **Soldiers' and Sailors' Civil Relief Act.**

MILITARY RETIREMENT. See **Jurisdiction**, 2.

MILITARY SERVICE. See **Selective Service Act**, 1–2.

MILITARY TRIALS. See **Constitutional Law**, I; **Courts-Martial**; **Jurisdiction**, 3.

MIRANDA WARNINGS. See **Evidence**; **Procedure**, 1.

MISUSE OF PATENTS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

MOB. See **Constitutional Law**, VI.

MONETARY CLAIMS. See **Jurisdiction**, 2.

MONTGOMERY COUNTY. See **School Desegregation.**

MOOTNESS. See also **Constitutional Law**, X; **Habeas Corpus**; **Jurisdiction**, 5; **Justiciability**, 1–2; **Military Appeals.**

1. *Exclusion of Congressman—Expiration of the Congress—Claim for salary.*—The case has not been mooted by Congressman Powell's seating in the 91st Congress, since his claim for back salary for the the 90th Congress from which he was excluded remains a viable issue. Powell v. McCormack, p. 486.

2. *Military prisoner—"Non-incarcerated status"—Interruption of sentence.*—Case is not moot. MR. JUSTICE DOUGLAS' order that petitioner be placed in "non-incarcerated status" was sufficient to interrupt running of petitioner's sentence under rationale of § 97 (c) of Manual for Courts-Martial that military prisoner who has been freed from confinement may not receive credit for time served during period of release. Noyd v. Bond, p. 683.

MOTIONS. See **Appeals**; **Procedure**, 2–3.

MOTION TO DISMISS APPEAL. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

MOTIVES. See **Taxes.**

MUNICIPAL ELECTIONS. See **Constitutional Law**, IV, 1, 3.

MUNICIPAL UTILITY SYSTEM. See **Constitutional Law**, IV, 1, 3.

MURDER. See **Constitutional Law**, IX; **Evidence**; **Procedure**, 1, 5.

NARCOTICS. See **Appeals**; **Procedure**, 2–3.

NATIONAL LABOR RELATIONS ACT. See also **Constitutional Law**, V, 2.

1. *Authorization cards—Unfair labor practices—Elections.*—Issuance of bargaining order is an appropriate remedy where employer who has rejected card majority has committed unfair labor practices which have made the holding of a fair election unlikely, or which have undermined a union's majority, caused an election to be set aside, and made the holding of a fair rerun election unlikely. NLRB v. Gissel Packing Co., p. 575.

2. *Employee representation—Authorization cards.*—Authorization cards can adequately reflect employee desires for representation and the NLRB's rules for controlling card solicitation are adequate safeguards against union misrepresentation and coercion where the cards are clear and unambiguous on their face. NLRB v. Gissel Packing Co., p. 575.

3. *Exclusive bargaining representative—Elections—Authorization cards.*—To obtain recognition as the exclusive bargaining agent under the Act, a union has not been required, prior to or since the Taft-Hartley amendments, to obtain certification as the winner of an NLRB election; it can establish majority status by possession of cards signed by a majority of the employees authorizing the union to represent them for bargaining purposes. NLRB v. Gissel Packing Co., p. 575.

4. *Freedom of speech — Employer and employees — Threats or promises.*—Employer's free speech right to communicate with his employees is firmly established and cannot be infringed by a union or the NLRB, and § 8 (c) of the National Labor Relations Act merely implements the First Amendment by requiring that the expression of "any views, argument or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8 (a) (1). NLRB v. Gissel Packing Co., p. 575.

NATURAL GAS. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

NEGLIGENCE. See **Federal Safety Appliance Act.**

NEGROES. See **Civil Rights Act of 1964**, 1–3; **School Desegregation**; **Voting Rights Act of 1965**, 1–3.

NEW JERSEY. See **Constitutional Law**, VII, 3.

NEW TRIALS. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 6.

NEW YORK EDUCATION LAW. See **Constitutional Law**, IV, 4.

NON-INCARCERATED STATUS. See **Habeas Corpus; Military Appeals; Mootness,** 2.

NONJUDICIAL TRIBUNAL. See **Constitutional Law,** III, 3.

NONMILITARY OFFENSES. See **Constitutional Law,** I; **Courts-Martial; Jurisdiction,** 3.

NONRESIDENTS. See **Soldiers' and Sailors' Civil Relief Act.**

NORTH CAROLINA. See **Constitutional Law,** II, 2–3; III, 2; IV, 5; **Procedure,** 6; **Voting Rights Act of 1965,** 1–3.

NOTICE. See **Constitutional Law,** III, 4; **Garnishment.**

OCCUPATIONAL TAXES. See **Constitutional Law,** III, 5–6; VIII, 1.

OCCUPATION OF BUILDINGS. See **Constitutional Law,** VI.

OFFENSES. See **Constitutional Law,** I; II, 1–3; III, 2; IV, 5; **Courts-Martial; Jurisdiction,** 1, 3; **Procedure,** 6; **Sentences.**

OFFICIALS. See **Removal.**

OFFSHORE OIL DRILLING. See **Admiralty; Outer Continental Shelf Lands Act.**

OHIO. See **Constitutional Law,** V, 3; VIII, 2; **Federal Rules of Criminal Procedure; Procedure,** 4.

OIL. See **Antitrust Acts,** 5.

OKLAHOMA. See **Constitutional Law,** IV, 2.

"ONE ENTITY" STIPULATION. See **Antitrust Acts,** 2–4; **Judgments; Patent Licenses.**

ORDERS TO BARGAIN. See **Constitutional Law,** V, 2; **National Labor Relations Act,** 1–4.

ORGANIZATIONAL CAMPAIGNS. See **Constitutional Law,** V, 2; **National Labor Relations Act,** 1–4.

OUTER CONTINENTAL SHELF LANDS ACT. See also **Admiralty.**

Artificial islands—Wrongful death actions—Not admiralty jurisdiction.—Remedy of petitioners, families of men killed while working on artificial island drilling rigs on the Continental Shelf, is under the Outer Continental Shelf Lands Act as supplemented by Louisiana law and not under the Death on the High Seas Act. Congress clearly intended that the artificial islands were to be treated as islands or federal enclaves within a landlocked State and not as vessels subject to admiralty jurisdiction. Rodrigue v. Aetna Casualty Co., p. 352.

PACIFIC NORTHWEST PIPELINE CO. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

PADDLE BOATS. See **Civil Rights Act of 1964**, 1–3.

PANAMA. See **Constitutional Law**, VI.

PAROLE. See **Immigration and Nationality Act**, 1–2.

PARTIES TO SUIT. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

PATENT APPLICATIONS. See **Patents**, 1–3.

PATENT LICENSES. See also **Antitrust Acts**, 2–4; **Judgments**; **Patents**, 1–3.

Royalties—Unpatented products—Misuse of patents.—Conditioning grant of patent license upon payment of royalties on products which do not use the teaching of the patent amounts to patent misuse. If convenience of parties rather than patent power dictates a percentage-of-total-sales royalty provision there is not misuse of the patent. Zenith Corp. v. Hazeltine, p. 100.

PATENTS.

1. *Contract claims—Public interest—Licensee estoppel.*—In the accommodation of (1) common law of contracts, and (2) federal law of patents requiring that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent, the technical requirements of contract doctrine must yield to the demands of public interest in the typical situation involving negotiation of a license after a patent has issued. Holding of *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 836, that licensee estoppel was "the general rule," is overruled. Lear, Inc. v. Adkins, p. 653.

2. *Payment of royalties—Validity of patent.*—Overriding federal policies would be significantly frustrated if licensees could be required to continue to pay royalties while challenging patent validity in the courts, and in this case Lear must be permitted to avoid payment of all royalties accruing after the issuance of the patent if Lear can prove that the patent is invalid. Lear, Inc. v. Adkins, p. 653.

3. *Royalties—Unpatented inventions.*—Respondent's claim to contractual royalties accruing before issuance of the patent, which raises question of whether, and to what extent, States may protect owners of *unpatented* inventions who are willing to disclose their ideas only upon payment of royalties is remanded for specific consideration by the California courts. Lear, Inc. v. Adkins, p. 653.

PAUPERS. See **Constitutional Law**, IV, 2.

PENALTIES. See **Sentences.**

PENITENTIARY OFFICIALS. See **Removal.**

PERSECUTION. See **Immigration and Nationality Act**, 1–2.

PERSONAL ATTACKS. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

PETROLEUM PRODUCTS. See **Antitrust Acts**, 5.

PETTY OFFENSES. See **Constitutional Law**, IV, 2; **Sentences.**

PIPELINE COMPANIES. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

PLACE OF ARREST. See **Constitutional Law**, VII, 2.

PLACES OF AMUSEMENT. See **Civil Rights Act of 1964**, 1–3.

PLACES OF ENTERTAINMENT. See **Civil Rights Act of 1964**, 1–3.

PLAIN ERROR. See **Constitutional Law**, III, 1; **Jurisdiction**, 4; **Waivers.**

PLEA IN BAR. See **Constitutional Law**, VIII, 2; **Federal Rules of Criminal Procedure; Procedure**, 4.

PLEAS. See **Constitutional Law**, III, 1; **Jurisdiction**, 4; **Waivers.**

POLICE INTERROGATIONS. See **Evidence; Procedure**, 1.

POLICE OFFICERS. See **Constitutional Law**, VII, 1–3.

POLITICAL EDITORIALS. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

POLITICAL PERSECUTION. See **Immigration and Nationality Act**, 1–2.

POLITICAL QUESTION. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

POSSESSION OF MARIHUANA. See **Constitutional Law**, III, 5–6; VIII, 1–2; **Federal Rules of Criminal Procedure; Procedure**, 4.

POST-CONVICTION PROCEEDINGS. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 6.

POST-CONVICTION RELIEF. See **Appeals; Procedure**, 2–3.

PRE-ELECTION MISCONDUCT. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

PRE-INDUCTION PHYSICAL EXAMINATION. See **Selective Service Act**, 1–2.

PREJUDGMENT GARNISHMENT. See **Constitutional Law**, III, 4; **Garnishment.**

PREJUDICE. See **Appeals**; **Procedure**, 2–3.

PRESUMPTIONS. See **Constitutional Law**, III, 1, 5–6; VIII, 1; **Jurisdiction**, 4; **Waivers.**

PRICE DISCRIMINATION. See **Antitrust Acts**, 5.

PRIMA FACIE CASE. See **Voting Rights Act of 1965**, 1–3.

PRISONERS. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2; **Removal.**

PRIVATE ANTITRUST SUITS. See **Antitrust Acts**, 5.

PRIVATE CENSORSHIP. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

PRIVATE CLUBS. See **Civil Rights Act of 1964**, 1–3.

PRIVILEGE. See **Constitutional Law**, III, 5–6; VIII, 1.

PROBABLE CAUSE. See **Constitutional Law**, VII, 1.

PROBATION. See **Sentences.**

PROCEDURE. See also **Antitrust Acts**, 2–4; **Appeals**; **Constitutional Law**, I; II, 2–3; III, 1–4; IV, 1, 3, 5; VIII, 2; IX; **Courts-Martial**; **Evidence**; **Federal Rules of Criminal Procedure**; **Federal Safety Appliance Act**; **Garnishment**; **Habeas Corpus**; **Immigration and Nationality Act**, 1–2; **Judgments**; **Jurisdiction**, 3–4; **Military Appeals**; **Mootness**, 2; **Patent Licenses**; **Removal**; **School Desegregation**; **Selective Service Act**, 1–2; **Sentences**; **Waivers.**

1. *Admissibility of in-custody statements—Retrials—Prospectivity of Miranda case.*—Standards which this Court established in *Miranda* v. *Arizona*, 384 U. S. 436, for determining admissibility into evidence of in-custody statements do not apply to persons whose retrials have commenced after the date of that decision if their original trials had begun before that date. Jenkins v. Delaware, p. 213.

2. *Appeals—Court of Appeals' rule—Screening of appeals.*—Ninth Circuit rule, requiring defendant who claims deprivation of his right to appeal to disclose errors to be claimed on appeal and to show that denial of appeal caused prejudice, is invalid since (1) it makes indigent defendant (who must prepare petition under 28 U. S. C. § 2255 without counsel) face "the danger of conviction because he does not know how to establish his innocence" and (2) it requires

PROCEDURE—Continued.

sentencing court to screen out supposedly unmeritorious appeals in summary fashion, a procedure rejected by this Court. Rodriquez v. United States, p. 327.

3. *Appeals—Motions—Remand for resentencing.*—Under circumstances of this case, including time since petitioner was sentenced, trial judge's failure to advise him of right to appeal and failure to inquire into circumstances surrounding petitioner's attempt to make *in forma pauperis* motion, no hearing is required and case is remanded to District Court, where petitioner should be resentenced so that he may perfect appeal as prescribed by the applicable rules. Rodriquez v. United States, p. 327.

4. *Appeals—Plea in bar—Marihuana Tax Act.*—The decision was one which might be appealed directly to this Court under 18 U. S. C. § 3731: if the dismissal of the indictment rested on ground that Fifth Amendment privilege would be a defense, then decision was one sustaining "plea in bar"; if dismissal was based on acceptance of Government's interpretation of the Act, then decision necessarily was "based upon [a] construction of the statute upon which the indictment was founded." United States v. Covington, p. 57.

5. *Codefendants' confessions—Confrontation Clause—Harmless error.*—Apart from the cumulative evidence of the confessions of the two codefendants who did not take the stand, the evidence against petitioner was so overwhelming that the violation of *Bruton* v. *United States,* 391 U. S. 123 (which held that the admission of a confession of a codefendant who did not take the stand deprived the defendant of his rights under the Sixth Amendment's Confrontation Clause), was harmless beyond a reasonable doubt. Harrington v. California, p. 250.

6. *Increased sentence after retrial—Reasons affirmatively shown in record.*—Due process requires that vindictiveness must play no part in the sentence a defendant receives after a new trial and that he be freed of any apprehension of retaliatory motivation on part of sentencing judge. Reasons for imposition after retrial of more severe sentence must affirmatively appear in the record and must be based on objective information concerning defendant's identifiable conduct after the original sentencing proceeding. North Carolina v. Pearce, p. 711.

PROMISES OF BENEFITS. See **Constitutional Law,** V, 2; **National Labor Relations Act.**

PROOF. See **Federal Safety Appliance Act.**

PROPERTY DAMAGE. See **Constitutional Law,** VI.

PROPERTY OWNERS. See **Constitutional Law**, IV, 4.

PROPERTY TAXPAYERS. See **Constitutional Law**, IV, 1, 3.

PROSECUTION. See **Selective Service Act**, 1–2.

PROSPECTIVITY. See **Constitutional Law**, IV, 1, 3; **Evidence**; **Procedure**, 1.

PUBLIC ACCOMMODATIONS. See **Civil Rights Act of 1964**, 1–3.

PUBLIC INTEREST. See **Constitutional Law**, V, 1; **Federal Communications Commission**; **Patents.**

PUBLIC SCHOOLS. See **Constitutional Law**, IV, 4; **School Desegregation**; **Voting Rights Act of 1965**, 1–3.

PUNISHMENT. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 6.

QUALIFICATIONS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

QUASI-CONTRACTS. See **Patents**, 1–3.

RACIAL DESEGREGATION. See **School Desegregation.**

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964**, 1–3; **Voting Rights Act of 1965**, 1–3.

RADIO BROADCASTING. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

RADIO PATENTS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

RAILROADS. See **Federal Safety Appliance Act.**

RAPE. See **Constitutional Law**, I; **Courts-Martial**; **Jurisdiction**, 3.

RATIOS. See **School Desegregation.**

REAL PROPERTY. See **Constitutional Law**, IV, 1, 3–4.

RECIPROCAL TRUSTS. See **Taxes.**

RECLASSIFICATION. See **Selective Service Act**, 1–2.

RECORD. See **Constitutional Law**, II, 2–3; III, 1–2; IV, 5; **Jurisdiction**, 4; **Procedure**, 6; **Waivers.**

RECREATION AREAS. See **Civil Rights Act of 1964**, 1–3.

REFUND OF TAXES. See **Jurisdiction**, 2.

REFUSAL TO BARGAIN. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

REGISTRATION. See **Selective Service Act**, 1–2; **Voting Rights Act of 1965**, 1–3.

REGULATIONS. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

RE-INDICTMENT. See **Constitutional Law**, II, 1; **Jurisdiction**, 1.

RELEASE FROM CUSTODY. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

RELIEF. See **Appeals**; **Constitutional Law**, III, 3; X; **Habeas Corpus**; **Jurisdiction**, 5; **Justiciability**, 1–2; **Military Appeals**; **Mootness**, 1–2; **Procedure**, 2–3.

RELIGIOUS MOTIVATION. See **Constitutional Law**, III, 5–6; VIII, 1.

REMEDIES. See **Admiralty**; **Constitutional Law**, V, 2; **Federal Safety Appliance Act**; **Habeas Corpus**; **Military Appeals**; **Mootness**, 2; **National Labor Relations Act**, 1–4; **Outer Continental Shelf Lands Act.**

REMOVAL.

Suit against federal officials—Removal to federal court—Color of office.—Right of removal under 28 U. S. C. § 1442 (a)(1) is made absolute whenever suit in state court is for any act "under color" of federal office, and test for removal under that statute is broader than test for official immunity. In this civil suit petitioners sufficiently showed that their relationship to respondent derived solely from their official duties and petitioners should have the opportunity of presenting their version of the facts to a federal, not a state, court. Willingham v. Morgan, p. 402.

REPLY TIME. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

REPRESENTATION ELECTIONS. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

REPRESENTATIVES. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

REPRISALS. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

REREGISTRATION. See **Voting Rights Act of 1965**, 1–3.

RERUN ELECTIONS. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

RESENTENCES. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; **Procedure**, 2–3, 6.

RESIDENTS. See **Constitutional Law**, IV, 4; **Soldiers' and Sailors' Civil Relief Act.**

RES JUDICATA. See **Immigration and Nationality Act**, 1–2.

RESOLUTIONS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

RESTORING COMPETITION. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

RETAIL COMPETITION. See **Antitrust Acts**, 5.

RETAILERS AND WHOLESALERS. See **Antitrust Acts**, 5.

RETALIATORY ACTION. See **Constitutional Law**, II, 2–3; III, 2; IV, 5; V, 2; **National Labor Relations Act**, 1–4; **Procedure**, 6.

RETIREMENT. See **Jurisdiction**, 2.

RETRIALS. See **Constitutional Law**, II, 1–3; III, 2; IV, 5; **Evidence**; **Jurisdiction**, 1; **Procedure**, 2–3, 6.

RETROACTIVITY. See **Constitutional Law**, IV, 1, 3; **Evidence**; **Procedure**, 1.

REVENUE BONDS. See **Constitutional Law**, IV, 1, 3.

RIGHT OF APPEAL. See **Appeals**; **Constitutional Law**, IV, 2; **Procedure**, 2–3.

RIGHT OF CONFRONTATION. See **Constitutional Law**, III, 1; IX; **Jurisdiction**, 4; **Procedure**, 5; **Waivers.**

RIGHT OF REMOVAL. See **Removal.**

RIGHT TO COUNSEL. See **Evidence**; **Procedure**, 1.

RIGHT TO VOTE. See **Constitutional Law**, IV, 1, 3–4; **Voting Rights Act of 1965**, 1–3.

RIGS. See **Admiralty**; **Outer Continental Shelf Lands Act.**

RIOT DAMAGE. See **Constitutional Law**, VI.

ROBBERY. See **Constitutional Law**, III, 1; IX; **Jurisdiction**, 4; **Procedure**, 5; **Waivers.**

ROBINSON-PATMAN ACT. See **Antitrust Acts**, 5.

ROYALTIES. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses**; **Patents**, 1–3.

RULE MAKING. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

RULE 60. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

RULES OF CIVIL PROCEDURE. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

RULES OF COURT. See **Appeals**; **Procedure**, 2–3.

RULES OF CRIMINAL PROCEDURE. See **Constitutional Law**, VIII, 2; **Federal Rules of Criminal Procedure**; **Procedure**, 4.

SAILORS. See **Immigration and Nationality Act**, 1–2.

SALARY. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

SALES. See **Antitrust Acts**, 5.

SALES TAXES. See **Soldiers' and Sailors' Civil Relief Act.**

SAN JUAN BASIN. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

SCANNING SIGNALS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

SCHOOL AFFAIRS. See **Constitutional Law**, IV, 4.

SCHOOL DESEGREGATION.

Faculty and staff desegregation—District Court's orders.—The District Court's 1968 order (part of yearly proceedings following an initial order to integrate certain Montgomery County, Alabama, school grades) dealing with faculty and staff desegregation, although modified by the Court of Appeals, is approved as written by the District Judge. U. S. v. Montgomery Bd. of Educ., p. 225.

SCHOOL DISTRICT ELECTIONS. See **Constitutional Law**, IV, 4.

SCHOOLS. See **Voting Rights Act of 1965**, 1–3.

SEAMEN. See **Immigration and Nationality Act**, 1–2.

SEARCH AND SEIZURE. See **Constitutional Law**, VII.

SEARCH OF HOUSE. See **Constitutional Law**, VII, 1, 3.

SEARCH WARRANTS. See **Constitutional Law**, VII, 2.

SEGREGATED SCHOOLS. See **Voting Rights Act of 1965**, 1–3.

SEGREGATION. See **School Desegregation.**

SELECTIVE SERVICE ACT.

1. *Criminal prosecution—Failure to appeal classification—Failure to report.*—Petitioner's failure to appeal his classification and his failure to report for pre-induction physical examination do not foreclose his challenging the validity of his classification as a defense to a criminal prosecution for refusal to submit to induction. He is not being prosecuted for failure to report for physical examination

SELECTIVE SERVICE ACT—Continued.

and such failure does not bar him from challenging the validity of his classification as a defense to his criminal prosecution for failure to report for induction. McKart v. United States, p. 185.

2. *Sole surviving son exemption—Termination of "family unit."*—Petitioner was entitled to exemption from military service, as the termination of the "family unit" was not intended by Congress to warrant ending the sole surviving son exemption under § 6 (*o*) of the Act. McKart v. United States, p. 185.

SELF-INCRIMINATION. See **Constitutional Law**, III, 1; VIII; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 4; **Waivers.**

SENTENCES. See also **Constitutional Law**, II, 1–3; III, 2; IV, 5; **Habeas Corpus**; **Jurisdiction**, 1; **Military Appeals**; **Mootness**, 2; **Procedure**, 6.

Criminal contempt—Petty offenses—Probation.—Congress made the federal probation statute (18 U. S. C. § 3651), under which most offenders may be placed on probation for up to five years, applicable to petty as well as more serious offenses and thus petty offenses may be tried by any combination of penalties authorized by 18 U. S. C. § 1 and § 3651. Since petitioner's sentence was within the limits of the congressional definition of petty offense, he was not entitled to jury trial. Frank v. United States, p. 147.

SEPARATION OF POWERS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

SERGEANT AT ARMS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

SERVICE CONNECTED. See **Constitutional Law**, I; **Courts-Martial**; **Jurisdiction**, 3.

SERVICEMEN. See **Soldiers' and Sailors' Civil Relief Act.**

SERVICE OF PROCESS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

SERVICE OF SUMMONS. See **Constitutional Law**, III, 4; **Garnishment.**

SERVICE STATIONS. See **Antitrust Acts**, 5.

SETTLORS. See **Taxes.**

SHERMAN ACT. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

SHIPS. See **Immigration and Nationality Act**, 1–2.

SILENT RECORD. See **Constitutional Law**, III, 1; **Jurisdiction**, 4; **Waivers.**

SIXTH AMENDMENT. See **Constitutional Law**, III, 1; IX; **Jurisdiction**, 4; **Procedure**, 5; **Waivers.**

SMUGGLING. See **Constitutional Law**, III, 5–6; VIII, 1.

SNACK BARS. See **Civil Rights Act of 1964**, 1–3.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

Sales and use taxes — Nonresident servicemen — Connecticut. — Section 514 of the Act does not exempt servicemen stationed in Connecticut, who are residents or domiciliaries of other States, from sales and use taxes imposed by Connecticut. Sullivan v. United States, p. 169.

SOLE SURVIVING SON. See **Selective Service Act**, 1–2.

SOLICITATION OF CARDS. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

SPEAKER OF THE HOUSE. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

SPECIAL APPEARANCES. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

SPECIAL ELECTIONS. See **Constitutional Law**, IV, 1, 3.

SPECIAL INQUIRY OFFICER. See **Immigration and Nationality Act**, 1–2.

SPEECH OR DEBATE CLAUSE. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

STANDARD OIL CO. See **Antitrust Acts**, 5.

STANDING. See **Constitutional Law**, III, 3.

STANDING QUALIFICATIONS. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

STATE COURTS. See **Patents**, 1–3; **Removal.**

STATEMENTS. See **Evidence**; **Procedure**, 1.

STATUTORY PRESUMPTIONS. See **Constitutional Law**, III, 5–6; VIII, 1.

STIPULATIONS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

SUBJECTIVE INTENT. See **Taxes.**

SUBJECT MATTER JURISDICTION. See **Constitutional Law**, X; **Jurisdiction**, 5; **Justiciability**, 1–2; **Mootness**, 1.

SUBSIDIARIES. See **Antitrust Acts**, 5.

SUMMONS AND COMPLAINT. See **Constitutional Law**, III, 4; **Garnishment.**

SUPREME COURT.

1. Retirement of CHIEF JUSTICE WARREN, p. VII.

2. Appointment of CHIEF JUSTICE BURGER, p. XV.

3. Temporary assignment of JUSTICE BRENNAN to the First Circuit as Circuit Justice, p. 931.

4. Presentation of "The Occasional Papers of Mr. Justice Burton," p. V.

SUPREME COURT RULES. See **Antitrust Acts**, 1; **Jurisdiction**, 6.

SURVIVING SON EXEMPTION. See **Selective Service Act**, 1–2.

SUSPENSION OF SENTENCE. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

SUSPENSION OF TESTS. See **Voting Rights Act of 1965**, 1–3.

TAFT-HARTLEY ACT. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

TAX AVOIDANCE. See **Taxes.**

TAXES. See also **Constitutional Law**, III, 5–6; VIII, 1–2; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 2; **Procedure**, 4; **Soldiers' and Sailors' Civil Relief Act.**

Estate taxes—Reciprocal trusts—Taxability of trust corpus.—Doctrine of reciprocal trusts, which was formulated in response to attempts to draft instruments which seemingly avoid the literal terms of § 811 (c)(1)(B) of the Internal Revenue Code while still leaving the decedent the lifetime enjoyment of his property, applies here and the value of decedent's estate must include the value of his late wife's trust. United States v. Estate of Grace, p. 316.

TAXPAYERS. See **Constitutional Law**, IV, 1, 3.

TEACHERS. See **School Desegregation.**

TELEVISION BROADCASTING. See **Constitutional Law**, V, 1; **Federal Communications Commission.**

TELEVISION PATENTS. See **Antitrust Acts**, 2–4; **Judgments**; **Patent Licenses.**

TESTIMONY. See **Constitutional Law**, IX; **Procedure**, 5.

TESTS OR DEVICES. See **Voting Rights Act of 1965**, 1–3.

TEXAS. See **Constitutional Law**, III, 5–6; VIII, 1.

THREATS OF REPRISAL. See **Constitutional Law**, V, 2; **National Labor Relations Act**, 1–4.

THREE-MILE LIMIT. See **Admiralty**; **Outer Continental Shelf Lands Act.**

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VOTING RIGHTS ACT OF 1965.

1. *Literacy tests—Burden of proof—Error.*—District Court's conclusion that appellant had not met burden imposed by § 4 (a) of refuting Government's prima facie case that use of literacy test coupled with County's segregated and unequal school system had discriminatorily deprived Negroes of the franchise, was not clearly erroneous. Gaston County v. United States, p. 285.

2. *Reregistration—Literacy tests—Unequal school system.*—Appellant's contentions that reregistration was conducted fairly and that significant strides have been made in equalizing and integrating its school system do not refute the fact that for many years the County deprived its black citizens of educational opportunities it granted its white citizens and that "impartial" administration of the literacy test today would perpetuate those inequities in another form. Gaston County v. United States, p. 285.

3. *Tests or devices—Suspension—Unequal educational opportunities.*—The Act's legislative history discloses that Congress was aware of the potential effect of unequal educational opportunities upon the right to vote when it designed the test-suspension provisions, and it is appropriate under § 4 (a) for a court to consider whether a literacy or educational requirement has the "effect of denying the right to vote on account of race or color" because the State or subdivision seeking to impose the requirement has maintained separate and inferior schools for its Negro citizens who are now of voting age. Gaston County v. United States, p. 285.

WAGES. See **Constitutional Law**, III, 4; **Garnishment.**

WAIVERS. See also **Constitutional Law**, III, 1, 5–6; VIII, 1–2; **Federal Rules of Criminal Procedure**; **Jurisdiction**, 4; **Procedure**, 4.

Guilty plea—Presumption of waivers—Silent record.—Waiver of privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by the Fourteenth; of the right to trial by jury; and the right to confront one's accusers—all of which are involved when a guilty plea is entered in a state criminal trial—cannot be presumed from a silent record. Acceptance of the guilty plea under the circumstances of this case constituted reversible error because the record does not disclose that petitioner voluntarily and understandingly entered his plea. Boykin v. Alabama, p. 238.

WARDENS. See **Removal.**

WARRANTLESS SEARCHES. See **Constitutional Law**, VII, 1–3.

WARRANTS. See **Constitutional Law**, VII, 1, 3.

WEAPONS. See **Constitutional Law**, VII, 1.

WHOLESALERS AND RETAILERS. See **Antitrust Acts**, 5.

WILFUL DISOBEDIENCE. See **Habeas Corpus**; **Military Appeals**; **Mootness**, 2.

WISCONSIN. See **Constitutional Law**, III, 4; **Garnishment.**

WITNESSES. See **Constitutional Law**, IX; **Procedure**, 5.

WORDS.

1. *"Place of entertainment."* Civil Rights Act of 1964, § 201 (b)(3), 42 U. S. C. § 2000a (b)(3). Daniel v. Paul, p. 298.

2. *"Place of public accommodation."* Civil Rights Act of 1964, § 201 (b)(2), 42 U. S. C. § 2000a (b)(2). Daniel v. Paul, p. 298.

WRONGFUL DEATH ACTIONS. See **Admiralty**; **Outer Continental Shelf Lands Act.**

YMCA. See **Constitutional Law**, VI.

YUGOSLAV SEAMAN. See **Immigration and Nationality Act**, 1–2.

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